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IN THE MATTER OF:	
DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III),	Docket No. 16-CRB-0003-PR (2018-2022)

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BEFORE: THE HONORABLE SUZANNE BARNETT
THE HONORABLE JESSE M. FEDER
THE HONORABLE DAVID R. STRICKLER
Copyright Royalty Judges

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P R O C E E D I N G S

(10:05 a.m.)

JUDGE BARNETT: Good morning, all. Please be seated.

JUDGE STRICKLER: Feels like the phrase "deja vu all over again" seems appropriate.

JUDGE BARNETT: Today is the date and time set for closing arguments in the matter of Determination of Royalty Rates and Terms For Making and Distributing Phonorecords. The license at issue is the license described in 17 U.S.C. Section 115, the license of musical works for these purposes. The cause number is 16-CRB-0003-PR.

I'm not -- Well, fortunately, you didn't miss anything you didn't already know.

We are here for closing arguments in this matter. And we have not heard how the parties have decided to schedule their arguments, who -- who's on first, what the time limits are, et cetera. We're trusting that you have that resolved.

But let's begin with having those who intend to argue to identify yourselves for the record, please.

MR. ELKIN: Michael Elkin, Amazon.

MS. CENDALI: Dale Cendali, Kirkland, for

Apple.

MR. STEINTHAL: Ken Steinthal for Google.

MR. MARKS: Benjamin Marks for Pandora.

MR. MANCINI: John Mancini for Spotify, U.S.A.

MR. SEMEL: And Benjamin Semel for the Copyright Owners. And I think -- they'll correct me; I think the division is that Services are going first, two hours for each side. They'll be dividing their two hours between them. And we'll go afterwards.

JUDGE BARNETT: Thank you.

MR. SEMEL: And I believe you made clear at the hearing, no rebuttals.

JUDGE BARNETT: Thank you very much. In that case, what we will do is we will go past noon. Obviously, we're not going to have a morning recess or a break until the initial two-hour session is completed. And then we'll have a noon break. And then we'll have a -- we'll hear from the Copyright Owners.

Are there others in the room who need to appear, even though you're not going to be arguing?

MS. CENDALI: Yeah, Your Honor, I'd just like to note, because she hasn't been here before,

that joining us today is Heather Grenier of Apple. She's the director of commercial litigation.

JUDGE BARNETT: Thank you. With the preliminaries out of the way -- well, it looks like Ms. Whittle is still troubleshooting the microphones. Let's begin.

And, Mr. Elkin, be aware that that might or might not be working, so speak up. If any of you who are speaking need to be closer so you can hear, feel free to move around the room so that you can hear what it is you have to respond to.

(Discussion off the record.)

JUDGE BARNETT: Mr. Elkin?

MR. ELKIN: Good morning. It's a pleasure to be back before the Panel. As you all know, I represent Amazon, and to avoid repetition and to streamline the presentation, four of the services, Amazon, Pandora, Spotify, and Google, have decided to collectively allocate our 96 minutes in a more cohesive way in topics, and I'm going to take the Panel through a roadmap in a moment so you'll know what's before you.

Rest assured, we still maintain our separate rate proposals, but there are sufficient commonalities, and the underlying issues affecting

them.

So I will, on behalf of Amazon, address how the interactive music industry is working. And I will point to evidence in the record that shows that revenue is maximized through a variety of business offerings, and that Services are generating increasing revenues and that Copyright Owners are thriving. The market is healthy.

Mr. Marks, on behalf of Pandora, will address the reasons the Board should set an all-in headline rate for musical works royalties, and he'll also take the Panel through the benchmark evidence offered by the parties.

Mr. Mancini, on behalf of Spotify, will argue why a percentage-of-revenue structure is both appropriate and economically efficient. He'll further address the Copyright Owners' proposal and take the Panel through the 801(b) analysis, which we contend favors the Services' proposals.

Finally, Mr. Steinthal, on behalf of Google, will address the Phono I, Phono II negotiations and settlement agreements and the recent Subpart A settlement to the extent that Mr. Marks doesn't cover that, and he will highlight the importance of the TCC prong.

We have endeavored, Panel, to try to keep as much of this as possible in -- in open session, but I have drawn the short straw. Nearly the entirety of my presentation will be -- contains restricted material.

JUDGE BARNETT: Would you like to begin that session, that closed session, now?

MR. ELKIN: I would, Your Honor.

JUDGE BARNETT: Okay. For those of you who are in the hearing room, we will have a portion of these closing arguments that are closed to the public, and if you do not have permission under the extant protective order, have not signed a nondisclosure agreement, we will ask that you wait outside. And we will reopen the hearing room as soon as possible.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

JUDGE BARNETT: And could someone who is near the door open it, please.

MR. MARKS: Would you like me to wait until they come in or should I go ahead as they filter in?

JUDGE BARNETT: I'm not sure anyone is going to come in. Oh, here they come.

MR. MARKS: All right.

JUDGE STRICKLER: How will you know when the last one came in?

MR. MARKS: I won't. I -- I think I'll go ahead now. They're mostly in. The others will be able to hear me. I'll speak loudly.

JUDGE BARNETT: Thank you.

MR. MARKS: I'll be addressing, as Mr. Elkin indicated, two subjects in my remarks today. First, I'll address why you should preserve the all-in structure of the existing rates and terms, that is, why you should set the mechanical rates royalty at issue here by setting an all-in headline rate and permitting a deduction for payments made for performance rights to the same rightsholders for the same works. And, second, I'll address the various benchmarks that the parties have

offered for your consideration.

As you know, each of the Services and including -- and Apple as well, have proposed rates and terms for the Section 115 license that, just like the existing rates and terms, would set a headline rate and permit a deduction for performance royalties.

As a matter of governing law and precedent, there's no question that you can set the mechanical rate with this structure, and in light of the record evidence, there's no question that you should.

The Copyright Owners first suggest that you don't have the statutory authority to set mechanical rates by establishing an all-in headline rate and permitting the deduction for performance rights royalties. But they don't cite any governing authority for this proposition. There is none.

If you did not have the statutory authority to set mechanical rights with the structure proposed by each of the Services for the upcoming license period, you could not have approved the settlements in Phonorecords I and II. The Register reviewed the Phonorecords I rate determination for legal error and found none.

The -- the Copyright Owners are judicially estopped from arguing otherwise. The Doctrine of Judicial Estoppel applies no differently to this forum than it does to other judicial proceedings, and the elements are clearly met here.

First, the Copyright Owners, in motion papers proposing adoption of the Phonorecords II settlement, advise that nothing in that settlement was contrary to the provisions of the applicable statutory license or otherwise contrary to law. This is plainly inconsistent with the position they're trying to assert here.

Second, they benefitted handsomely from the adoption of those settlements. They avoided the need to continue to litigate whether and the extent to which interactive streaming even implicates mechanical rights as a matter of law. And they've been paid many millions of dollars in royalties.

And, third, there's a significant detriment to the Services that arises out of this attempt to reverse their legal position.

First, our trial positions were developed with the understanding that this rate structure is within your statutory authority. Second, as you've heard, second -- several of the Services have

expressly designed product offerings to comport with the existing rate structure. And, third, a mechanical-only rate structure would be prejudicial to the Services' business interests for all the reasons discussed in our papers, some of which I'll address later in my remarks.

Even if the Copyright Owners were not judicially estopped from contesting your authority to adopt the rate structure we proposed, their arguments would still fail. The best they can muster is a series of utterly unremarkable propositions.

The mechanical rate and the performance right are separate rights. You aren't tasked with setting right -- rates for performance rights. The Subpart B rates and terms include a mechanical-only per-subscriber floor, so mechanical rates under that subpart could never be zero. And the rate determinations that followed Phonorecords I and II were the result of settlements, rather than judicial decision-making.

These observations are undisputed, but they are also completely irrelevant to the scope of your statutory authority to adopt any of the Services' proposals.

The mechanical right was separate from the performance right in 2008 when they asked you to approve the Phonorecords I settlement, and it was a separate right when they asked you to approve the Phonorecords II settlement. The rates that emerged from those prior proceedings do not set performance rights -- rates, and the rates proposed by the Services here would not do so either.

The fact that Section 115 does not charge you with setting performance royalties thus has no bearing on your authority to set rates with the structure proposed by the Services.

And the existence of a mechanical-only floor in Subpart B is likewise irrelevant to the question of your statutory authority to adopt one of the Services' all-in rate proposals. They previously acknowledged your authority to set rates without a mechanical-only floor, and they asked you to do just that with respect to Subpart C. They nowhere explain why you had the authority to adopt an all-in rate without a mechanical-only floor for Subpart C in 2012 but you now lack the authority to do it with respect to both B and C here.

And they nowhere explain why the scope of your authority is different in the context of

adopting a settlement than in setting rates after trial. Either the rates set pursuant to settlements were lawful or they were not. And they had to be lawful to obtain your approval and the Register's approvals. And the Services' proposals are lawful just the same.

JUDGE FEDER: Mr. Marks, is this a novel question that we need to refer to the Register?

MR. MARKS: I don't believe it is. I think you have the authority. The Register has already examined this rate structure and found it -- for legal error and found that there was none.

JUDGE FEDER: Was this question ever directly presented to the Register?

MR. MARKS: I think that the question of whether or not this is a lawful -- whether or not you have the authority to adopt this rate structure was squarely presented by Phonorecords I and the review. I don't believe that it was framed as please pay attention to this particular facet and give us a direct answer on that. But I don't think it requires -- I don't think it requires referral as a novel question of law.

I think, based on the fact that this has been the rate that has been twice approved and

reviewed for legal error, that precedents allow you to do it again here.

JUDGE STRICKLER: Do I understand your answer to Judge Feder's question, then, to be that it was directly presented in both -- in connection with both the 2008 and 2012 settlements, but it wasn't presented in isolation from the other issues that were part and parcel of those settlements?

MR. MARKS: I think that's right. It wasn't -- the question wasn't presented as a separate question to the Register as far as I'm aware, but I think it was squarely implicated by the Register's review of -- of the rates set after Phonorecords I, whether or not you can have a mechanical royalty rate with this structure. I think that was squarely presented by the need to approve rate -- rates with this precise structure.

So I'll now turn to why you should set the mechanical rights royalty rate at issue here by determining an all-in headline rate for musical works and then permitting statutory licensees to deduct their performance rights royalty payments.

The evidence at trial established the following: Mechanical rights and performance rights are perfect complements for interactive streaming

services. And as Mr. Herring explained, mechanical rights are literally worthless to an interactive streaming service without the accompanying performance rights. And the more a Service is asked to pay for one, the less it would be willing to pay for the other.

Eliminating the current rate structure in favor of a mechanical-only rate would diminish the predictability of musical work royalty costs. And as Mr. Herring and others testified, heightened uncertainty would impede investment and would reduce -- reduce growth of the market for interactive streaming to the detriment of all.

Relatedly, you can't assess the Section 801(b) objectives without also considering the payments made by interactive streaming services to the same rightsholders for performance rights. I don't see how you can judge whether or not publishers and songwriters are earning a fair return from interactive streaming in a vacuum without also considering the performance rights royalties, and I don't see how you can measure the Services' opportunity to earn a fair income in a vacuum that ignores the vast sums they also to have pay for performance rights.

JUDGE STRICKLER: The -- the Copyright Owners make the point that although, notwithstanding any argument about the perfect complementarity of the performance right and the mechanical right, the publishers need the mechanical right for a host of reasons that are separate and apart from the performance right, particularly with regard to being able to make advances to artists. So in that sense, their argument is that there's not a -- a complete interchangeability between the two rates, certainly from the licensor's point of view. Can you address that?

MR. MARKS: Sure. So what I would say to that is that how publishers recoup the voluntary advances that they make is entirely within the Copyright Owners' control. Neither interactive streaming services, nor the Board, has any say in what advances are made or how they are recouped.

It was introduced at trial, they could alter the contractual relationships if they wanted, but they don't even need to do that because if publishers want to recoup faster without altering any contracts, all they have to do is charge less for performance rights, which would result in an increase in their mechanical royalties. So if they

want to recoup faster, all they have to do is charge less to Services by the way the -- the rate would be structured would then pay more in mechanical royalties. It's entirely within their control how quickly they recoup.

JUDGE STRICKLER: Look at this from a high level for a second. Your answer to me, and I've seen this answer in the papers --

MR. MARKS: Yes.

JUDGE STRICKLER: -- it doesn't take me by surprise, is that let me tell you what they could do in their business. But isn't that exactly what -- what you're chafing at, "you" meaning the Services, that you say don't tell us how we -- how we can expand the market and what rates we're supposed to set because you're not in this business; we're in this business? Mr. Mirchandani testifies as to the best way to exploit the market. Spotify talks about the best way to exploit the market. And you say we're doing it, and we're the ones in the business who know how to do it. So, basically -- I'll be a little strident -- leave us alone, because -- because we're the ones who have the expertise.

Now you're telling them how they should -- how they should dole out advances and how they

should recoup them. Are you making inconsistent arguments?

MR. MARKS: I'm not. And I appreciate the question, but I think there's a critical -- critical distinction.

The difference here is we're just talking about how the Copyright Owners are dividing the spoils amongst themselves. When they are making suggestions about what we could do to change our business, it's not how Pandora and Spotify and Amazon and Google and Apple divide the spoils amongst themselves or divide profits amongst themselves. They're asking us to change our practices with respect to counterparties we don't control, customers or record labels, where we don't have control and where we're subject to the constraints of the market and the demands of the others.

And so it's a very different circumstance where we say: You're saying that we could do X, and we're telling you we can't do X because we know our business and we know that record labels just won't agree to charge us less money or we know that there are lots of consumers out there who simply just won't agree to pay $9.99 for a subscription.

So I think it's very different when you're talking about an internal division of money among the Copyright Owners as opposed to trying to have people speculate on their side about what our businesspeople could do when our businesspeople have come into this court and testified they can't and that the proposals are unrealistic. So that's I think the critical distinction.

So let me turn -- turn back very briefly to the -- the other points I wanted to make, is that Dr. Katz and Dr. Leonard testified at length as to the economic rationale for preserving the deduction for performance rights payments. And notably absent from the trial record is testimony from the Copyright Owners' experts on an economic rationale for mechanical-only payment. There is none. You would not see mechanical-only deals in the unregulated marketplace they want the rates to emulate and they know it.

And you mentioned one of the reasons that they argued against an all-in rate structure relating to the advances point I just addressed. The other point I just wanted to anticipate and respond to or respond to the arguments they made in the papers, Dr. Rysman observed that if performance

rights royalties are sufficiently high, then there's the potential that a mechanical rights payment after a deduction might be zero.

And my response to that is, not to be flip, but so what? How is that unfair? If that scenario ever came to pass, the Copyright Owners would still be receiving every penny that the Board has determined to be an appropriate all-in rate to satisfy the Section 801(b) objectives, if not more. And, moreover, that same --

JUDGE STRICKLER: I'm sorry, I didn't mean to interrupt you.

MR. MARKS: No, go ahead.

JUDGE STRICKLER: Are you distinguishing, then, in that answer or that point the Copyright Owners from the publishers themselves? When you say even the publishers would be receiving every penny.

MR. MARKS: No, I'm saying -- well, publishers and Copyright Owners together or independently, depending on what the performance rights royalties are. Again, that's not a matter that's in our control or the Board's control, but they would still be able to receive whatever amount -- the idea that there wouldn't be a mechanical rights payment following the deduction -- deduction,

if that came to pass, it's only because performance rights are at a point and that -- and they're receiving the benefits of that.

And the other point I would make, and then I'll move on, is that that same possibility has existed for the past five years with regard to Subpart C. And there's no evidence in the record of any unfairness that has resulted from that arrangement or is likely to result during the upcoming license period.

I'm going to briefly address the issue of fragmentation of the performing rights market, which Pandora and others have argued is one of the reasons to eliminate the mechanical-only floor from Subpart B.

The Copyright Owners first contend that there is no evidence of fragmentation. That's not so. Numerous witnesses testified to the emergence of GMR as a fourth performing rights organization. And Mr. Parness testified about the looming concern that significant publishers will fully withdraw from ASCAP and BMI following the Court's rejection of their attempts to partially withdraw, as well as recent attempts by ASCAP and BMI to start offering only fractional works licensing, even though that

has never been their practice, as he explained. And fractional licensing would defeat the pro-competitive benefits that give the blanket license its antitrust lease on life.

Mr. Kokakis acknowledged, his unequivocal statements at a public Copyright Office roundtable, on the slide, that Universal was planning such a full withdrawal. He attempted to recant those statements as no longer reflective of Universal's current intentions, but he did not deny recent conversations with musical services on the potential for a full withdrawal, nor could he.

There's no question that the possibility of further fragmentation during the upcoming license period exists, and that is why Dr. Katz and others have explained that it's appropriate to counterbalance that potential for heightened publisher market power by eliminating the mechanical-only floor.

They next contend there's no evidence that fragmentation has led to increased performing rights royalties. Again, Mr. Parness testified to precisely the opposite, and his testimony was uncontroverted. And, moreover, Dr. Katz and others explained why, as a matter of economics, one would

expect future fragmentation to result in higher performing rights royalties, not as a matter of any increase in value but, rather, as a matter of market power and the Cournot complements problem.

So there's no good reason, we submit, to preserve a mechanical-only floor in that situation.

The remainder of my remarks this morning will be devoted to the various benchmarks offered by the parties. I'll start by observing that the Copyright Owners are trying to drastically limit the types of evidence you consider. They want to exclude your consideration of the voluntary settlement that established the existing rates, direct licenses between streaming services and publishers, and the Subpart A settlement. But those efforts are utterly lacking in merit.

Their contention that the only benchmark you may consider are agreements from a market without rate regulation is pure invention. And nothing in the statute prescribes any specific methodology by which you are to determine rates beyond the directive to achieve the four stated objectives.

Courts have repeatedly recognized that Section 801(b) is not intended to produce a market

rate. I've put the language from the RIAA case from the D.C. Circuit, 1999, on the slide. More recently, in the Music Choice appeal in 2014, the D.C. Circuit said that the -- the Act does not require the Judges to use market rates to help determine reasonable rates.

JUDGE STRICKLER: So your understanding of the law, then, is we're not required to use market rates as the final rates. We could if we thought the evidence supported it; we're just not required?

MR. MARKS: You are not required to use them, but I agree with you that there's not a prohibition if you felt that market rates met the -- met the Section 801(b) objectives and the market rates were from a sufficiently analogous market and not subject to other deficiencies, but if there were market rates from a sufficiently analogous market that you thought was a reliable benchmark, there's nothing about -- there's no prohibition on using market rates. And you'll see we -- we've proposed market rates as well.

JUDGE STRICKLER: Thank you.

MR. MARKS: So let me first turn to the 2012 settlement, which, as Dr. Katz testified, is an

excellent benchmark because it involves the same rights, the same uses of music, a number of the same parties, and it is relatively recent.

And as the analysis of Dr. Katz and others of how the market has performed and evolved since 2012 shows, relatively little adjustment is needed for that agreement to satisfy the statutory objectives going forward.

I'll just briefly reiterate that in the marketplace today, there are more songwriters than ever before, more musical works available for licensing than ever before, more sound recordings available for licensing than ever before.

After the precipitous decline of piracy and the disaggregation of the album, music publishing industry revenues stabilized and are now increasing. And no interactive streaming service has obtained -- been able to obtain sustained profitability.

Moreover, as Mr. Steinthal will address in more detail, the concerns the Copyright Owners put forth at trial as the bases for their proposal to radically restructure the rates and massively increase them were all anticipated in the negotiation of the existing rates and terms.

As -- accordingly, it should come as no surprise that the Copyright Owners would like to prevent you from even considering that agreement, but there's no merit to the arguments they make in support. And as the D.C. Circuit has observed, the Act expressly allows you to consider prevailing rates. You're not bound by them, obviously, but -- but there's no prohibition against your considering them.

So what are the arguments that they make? Well, first, they contend that the requirement in the existing regulations that rates be determined de novo precludes your consideration of the 2012 settlement. And as we explained in our papers, it does not. What those provisions mean is that the existing rates are not precedential. And any proposal to extend them must be evaluated on its merits in light of the statutory objectives, no differently than any other proposal. And precisely that type of evaluation was the subject of extensive expert testimony by Dr. Katz and others.

Second, the Copyright Owners contend that you should not consider the 2012 settlement because that would discourage parties from entering into settlements. They cite no authority for this

proposition. The Board and other rate-setting tribunals routinely evaluate prior settlements. Rightsholders and music users both know this, and when parties don't want their settlement agreements to be used by a counterparty as evidence in a future proceeding, they can say so.

There is no such provision in the 2012 settlement, notwithstanding Mr. Israelite's admission that the NMPA's lawyers knew just how to draft one. And as the 2012 settlement is a fully integrated agreement, it cannot be interpreted to include an unexpressed prohibition on use as evidence here.

Moreover, the same alleged disincentive to enter into agreements because they could be used as benchmarks applies no differently to voluntary licenses. Parties do direct deals knowing they could be used as benchmarks in a future proceeding. And that is just part of the calculus of risk that parties consider.

Third, the Copyright Owners assert that the Services have not set forth a sufficient evidentiary basis for how the rates were arrived at in the 2012 settlement. I have two responses for that.

First, it's not true. Mr. Steinthal will address the negotiations in more detail, but I'll just briefly observe that there is ample record evidence on how each of the key elements were negotiated. An all-in rate structure with a deduction for performance rights royalties, a headline rate of 10.5 percent of revenue, a greater-of formulation with alternative royalty measures based on per-subscriber minima, or a percentage of label payments, minima that vary by service category to reflect that different business models require different economics to succeed and the reason there was originally a mechanical-only floor in Subpart B but not one in Subpart C.

JUDGE STRICKLER: You say there's ample record evidence with regard to how all those particular elements of the 2012 and perhaps 2008 settlement were -- were created. Are you going to identify that record evidence? Is Mr. Steinthal going to talk about that?

MR. MARKS: Well, I would say, first and foremost, that the evidence is spelled out in all of our post- -- post-trial filings. I think Mr. Steinthal was going to, in the interest of time, address the negotiations in more detail, but

certainly the testimony of Mr. Parness and Ms. Levine about how those agreements came to pass and what the -- what the give-and-take across the bargaining table was and what the concerns were on each side as they understood them about how we got to that, and there's some testimony from Mr. Israelite on that as well.

JUDGE STRICKLER: Okay. Those are the three witnesses that I recall from looking at the papers and --

MR. MARKS: Correct.

JUDGE STRICKLER: -- recall from the proceeding. You're not referring to anyone else?

MR. MARKS: No.

JUDGE STRICKLER: Other than those three?

MR. MARKS: I'm not.

JUDGE STRICKLER: Okay, thank you.

MR. MARKS: My other response is that, as Dr. Katz explained, and this was the subject of some questions that you asked Dr. Katz at trial, Judge Strickler, the whole point of using a benchmark is that you don't have to build up a set of rates and terms from the ground up.

It's not necessary to rejustify every single facet of an agreement. If -- if an agreement

is sufficiently analogous to be used as a benchmark, it's enough to take it as a whole, evaluate that benchmark in relation to the license at issue, and make only those modifications that are necessitated by differences in circumstance or changes in marketplace conditions to satisfy the Section 801(b) objectives.

So while you are certainly not bound by the existing rates and terms of the settlement that led you to adopt them, there is no prohibition against your evaluating that settlement as a benchmark and making such adjustments as may be appropriate in light of the record developed at trial.

Another set of benchmarks offered by the Services are their direct license agreements with music publishers. These agreements are excellent benchmarks. They are recent. They involve many of the same parties. And they cover exactly the same mechanical rights at issue here.

JUDGE STRICKLER: How do you address the -- the shadow defense, if you will, that's raised by the Copyright Owners saying, well, of course, these rates are set the way they are because the default position is -- is to go back to the statutory

license? Are you really just -- in essence, they're just repeating what the statute requires.

MR. MARKS: I'd address it in two places.

JUDGE STRICKLER: What the regulations require. Excuse me.

MR. MARKS: Yeah. I'll address it in two ways. First is that they -- they suggest you can't even consider them because they're assertedly subject to the shadow of the statutory license, but at the outset almost, there's not really a basis to exclude that from your consideration.

If there were a prohibition against considering direct licenses as benchmarks, even if they were arguably subject to a regulatory shadow, you couldn't have considered the Pandora/Merlin benchmark in Web IV or the iHeart direct licenses, or the Judges couldn't have considered Sirius XM's licenses with independent record labels in SDARS II.

JUDGE STRICKLER: That's an admissibility argument, I guess, so now we're going to go to the issue of weight?

MR. MARKS: Exactly. So they're -- right. They make two different arguments. One is that you can't even consider it, and the second is that you shouldn't consider it.

So my first argument is, clearly, you can consider it as the Panel has considered direct licenses of a variety of manners. There's ample precedent for considering a wide variety of voluntary licenses that are subject to a regulatory shadow under the 801(b) standard. And you can and should do so here.

And I'll just briefly address what the conclusions are to be drawn from the direct license evidence, and then I think we'll go into closed session so that I can respond to the weight issue.

So the conclusions which I can say in open court that are compelled from the examination of the direct license agreements are that a rate structure with an all-in headline rate and a deduction for performance rights is appropriate. A percentage-of-revenue model subject to per-subscriber or percentage of label cost minima is appropriate. Fees that vary across service categories are appropriate, and a one-size-fits-all approach is not. And there's no need for a mechanical-only floor. That's the clear -- clear implications of the -- of the weight of the direct license evidence.

And now if we can clear the courtroom,

I'll answer the second part of your question, Judge Strickler.

JUDGE STRICKLER: Are --

JUDGE BARNETT: Are you going to ask a question?

JUDGE STRICKLER: I was just going to ask -- yeah.

JUDGE BARNETT: Okay.

JUDGE STRICKLER: Your last conclusion, there's no need for a mechanical-only floor, and this is in your -- your demonstrative or your slide, that comes from the direct license agreements.

MR. MARKS: Yeah.

JUDGE STRICKLER: So you're saying that the evidence shows that there are no mechanical-only floors in the direct -- in any of the direct licenses?

MR. MARKS: I'm not saying that, but I'd be happy to answer that question with specifics once we clear the courtroom. I don't want to -- I'm concerned that if I answer the question the way I want to, I'll trip over restricted information.

JUDGE STRICKLER: Okay, well wait. Thank you.

JUDGE BARNETT: We will ask, then, those

of you who are not privy to confidential or restricted information to please wait outside.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

MR. MARKS: Mr. Steinthal will be addressing the Copyright Owners' recent agreement with the recording industry on Subpart A rates in more detail as part of his presentation. But since it's a benchmark that many Services have -- Service experts addressed, I'd like to touch briefly on a few aspects of that potential benchmark as well.

First, it provides compelling evidence of how record labels and music publishers value their relative contributions to the distribution of recorded music when they negotiate directly. The Copyright Owners' conclusory assertions that their contributions have increased relative to record labels' cannot be squared with their recent agreement to adopt an even smaller split of the proceeds from physical sales and digital downloads during the upcoming license period than they receive today.

Second, their contention that the markets are not sufficiently analogous to warrant comparison rings hollow in light of their core claim that interactive streaming is a marketplace substitute for sales of recorded music.

And, third, the notion that the Subpart A

settlement should be disregarded because so little was at stake for the Copyright Owners is simply not credible as the evidence at trial shows that the recording industry still generates billions of dollars a year in revenues from physical sales and digital downloads.

As numerous experts testified, the Subpart A settlement benchmark is powerful evidence that the existing rates for Subparts B and C are, if anything, too high.

So I'm going to turn now to the sound recording agreements and end there.

Why are the Copyright Owners so desperate to preclude even any consideration of the various benchmark agreements that actually relate to mechanical rights? Because any reasoned evaluation of them confirms that the Amazon, Google, Pandora, and Spotify proposals satisfy the 801(b) objectives, and the Copyright Owners' proposal to radically restructure and significantly increase the existing rates does not. They want to put the rabbit in the hat by making their preferred benchmark the only benchmark you consider.

It's not a reliable benchmark as I'll -- as the record at trial reflects. The sound

recording license marketplace is infected by the market power of the complementary oligopoly that determines the rates for such licenses. And Dr. Eisenach made no effort to adjust for that fatal flaw.

Moreover, the sound recording license market is not sufficiently analogous to this marketplace as the Board has recognized in rejecting the use of musical works licenses to set sound recording royalties in other proceedings.

As the D.C. Circuit observed in its 2014 Music Choice decision, which affirmed the rejection of musical works licenses as a benchmark for sound recording rates, that market involves different licensors and different intellectual property that requires a completely different set of investments and creative contributions to produce. And Dr. Eisenach's attempts to compensate for these differences, the record reflects, were error-riddled, conceptually flawed, and unreliable. To be blunt, his analysis -- his benchmark analysis was defective from the get-go and, as detailed at length in our post-trial filings, got worse from there.

In their post-trial papers, they offer a

series of arguments to try to resuscitate the benchmark, but none has merit. I'll just address them very briefly. First, they contend that the Services have somehow failed to prove record label market power notwithstanding the clear findings of the Panel in Web IV on this subject.

This argument is not only wrong on the merits as there was extensive economic analysis on this very point by Dr. Katz and others here, it also misapprehends the parties' respective burdens on this point.

The sound recording license marketplace is their benchmark, not ours. It's up to each party to demonstrate the reasonableness of its own rate proposal and the soundness of the evidence it offers in support. It was their burden to show, not our burden to negate, that either your Web IV findings were erroneous or that the market, in the brief interval since that decision and the period covered by it, has changed in some material way. They didn't carry that burden. They nowhere claim that your detailed fact finding on this point, following a vigorously contested trial in Web IV, was wrong.

And their arguments about collateral estoppel in their reply papers are beside the point.

No one is saying that they were collaterally estopped from proving that their benchmark agreements are the product of an effectively competitive market. What we're saying is that they utterly failed to do so.

Dr. Eisenach's contention that the sound recording license market has magically transformed in the intervening two years was demolished on cross-examination. The sound recording agreements admitted into evidence in this proceeding that cover both the period examined in Web IV and the data that Dr. Eisenach used here are literally the same agreements in many cases or, in any event, are indistinguishable in terms of rates.

Dr. Katz and others conducted their own examinations of those agreements and testified that the lack of effective competition in that market has, in fact, not changed at all.

The copyright --

JUDGE STRICKLER: If I may with regard to the Copyright Owners' use of the sound recording agreements and the rates therein to create a rate that we should use and a ratio that Dr. Eisenach derived, as I recall, your colleague took Mr. Eisenach -- Dr. Eisenach --

MR. MARKS: Yes.

JUDGE STRICKLER: -- excuse me -- through -- in cross-examination through some various alleged corrections. Do you recall that cross-examination?

MR. MARKS: I do that recall, yes.

JUDGE STRICKLER: Is it your position, is it Pandora's position, that -- that if we were to utilize Dr. Eisenach's analysis, it should be utilized subject to the corrections that -- was it Mr. Isakoff?

MR. MARKS: Isakoff.

JUDGE STRICKLER: Isakoff, excuse me, Mr. Isakoff brought forth and alleged to be, and you now allege to be, correct me if this is in error, a corrected version?

MR. MARKS: I'll answer that in two ways. We don't think that would be -- we don't think it would be appropriate to use those. We don't think they're sufficiently analogous. We don't think that it's a reliable benchmark.

So we actually don't think -- it's not our position that that's what you should do, is take that benchmark and just make those corrections. Because of all of the flaws and the unreliability of

the analysis and because we have much better benchmarks in terms of the direct license agreements.

In terms of the analysis of the existing rates and terms, we have much better benchmarks by which to evaluate the statutory objectives. So Pandora's position, and I think I speak for the other Services, is that you shouldn't use it at all.

Clearly, if you were to disagree and decided that you wanted to use it, absolutely you would have to make -- you would have to correct for the errors in his analysis, and Mr. Isakoff's corrections are examples of the types of things that would -- types of adjustments that would have needed to be made in order -- I don't think they were intended to be a comprehensive list, but certainly each of those is set forth in the post-trial papers.

JUDGE STRICKLER: And one of those was an effective competition steering analogous adjustment that he -- he walked Dr. Eisenach through on cross-examination?

MR. MARKS: Yes. Yes, one of those, but certainly there are many others, and those -- those are all addressed in more detail in our post-trial filings.

JUDGE STRICKLER: Thank you.

MR. MARKS: So the -- the final point that I want to make this morning is that, perhaps recognizing the infirmities of the argument, they attempt to hedge -- hedge the argument that there's no market power by suggesting that inflation of the sound recording license rates as a result of record label market power is actually a good thing. It's not a problem at all; it's a feature to celebrate because, absent governmental regulation, the mechanical rights license marketplace would not be effectively competitive either.

This twisted analysis, I think, entirely misses the point of why marketplace agreements can be useful benchmarks in rate proceedings. Marketplace agreements are only likely to reflect fair income for licensors, fair returns for licensees, the relative roles of the parties, maximization of output, maximization of availability, when they arise in an effectively competitive market. When agreements are infected by market power, there's no reason to believe that the quote, unquote, marketplace outcome will reflect any of the Section 801(b) objectives as a matter of economics, let alone meet all of them.

They have truly presented an upsidedown view of what the Section 801(b) standard is and what it's supposed to do. If the availability of the compulsory license under Section 15 -- Section 115 is supposed to protect Copyright Owners from the market power of copyright users, and not to protect consumers from the market power of music publishers, why have they been the ones arguing to get rid of this protection for decades while licensees have been arguing to retain it?

The law is clear: Section 801(b) is not intended to produce for the Copyright Owners whatever rates they might be able to extract in an unregulated market in which they can exercise market power. If that were the goal, there would be no need for Section 801(b) or a compulsory license at all. With that, I'll turn it over to Mr. Mancini.

JUDGE BARNETT: Thank you, Mr. Marks.

CLOSING ARGUMENT BY COUNSEL FOR SPOTIFY

MR. MANCINI: Your Honors, I'm going to begin in a public session, but in a few minutes we'll return to restricted.

You just heard from Mr. Marks about the appropriateness of the benchmarks that the four Services relied upon to support their rate proposals

advanced herein. Next you will hear, one, why the Services' rate proposals best align incentives and, conversely, the Copyright Owners' rate proposals do not.

Two, why the Services' rate proposals are consistent with the 801(b) factors and the Copyright Owners' are at odds with these factors. And, three, why economic theory supports the adoption of the Services' rate proposal.

Before we begin, however, some context is in order. The Services' rate proposals not only best comport with the relevant benchmarks, namely, the 801(b) factors and relevant economic theory, but they also advance the bedrock principles behind U.S. copyright law. They do so because the -- the Services' proposals promote the "progress of science and usefulness of the arts, as well as the broad public availability of music." Principles embodied in our U.S. Constitution and Supreme Court precedent.

In addition, our proposals allow for interactive streaming services to continue to grow and potentially, in turn, grow the entire music ecosystem. The Services' proposals seek to and do maximize returns for all participants in that

ecosystem, not just the biggest music publishers. And they do so because a revenue-based royalty -- royalty structure allows music publishers to share in the upside. As the Services make more money, the publishers and songwriters make more money.

In addition, the Services' proposals accommodate for pricing discrimination that captures lower-willingness-to-pay users and fosters active user engagement once users subscribe. For example, ad-supported offerings are a very important part of that pie that is growing for everyone, because they're the best alternative to piracy. As Mr. Will Page pointed out, it has always been and it always will be voluntary to pay for music.

Conversely, the Copyright Owners' proposal here is the antithesis of these objectives. Rather than advancing the bedrock principles of copyright law, they seek to distort those principles to their self-interest and to the detriment of consumers by, among other things, pricing out lower-willingness-to-pay consumers and disabling options like ad-supported services.

Their own witnesses, including Mr. Israelite, have acknowledged that similar copyright holders in the past have wrongly sought to

hinder technological advances in the distribution of content. Here the Copyright Owners are similarly on the wrong side of copyright law.

As the Supreme Court has reminded us, "the limited scope of the Copyright Owners' statutory monopoly reflects a balance of competing claims upon the public interest. Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature and music and the other arts." Congress intended that this rate proceeding reflect and strike that same balance.

A revenue-based royalty structure with appropriate back-stops properly aligns incentives and strikes that right balance. First, both the Copyright Owners and the Services have an incentive to grow revenue, and all have a stake in the health of the overall music ecosystem.

The Services recognize readily that they would not have access to music needed for streaming in the first place if songwriters stop writing songs. Likewise, the Copyright Owners and Mr. Israelite in part heralded the Services as "important partners" to the publishers that have

"played a positive role in streaming and stemming piracy."

A percentage-of-revenue regime further incentivized Services to maximize engagement by giving users access to music discovery features that allow them to experiment with new and broader types and genres of music.

This helps more users listen to more music and explore what is known as more long-tail music. Those innovative discovery tools, developed after the investments of hundreds of millions of dollars, have helped a lesser-known long-tail artist break out to the benefit of all Copyright Owners.

When user engagement is high, user churn is low, and the Services continue to encourage the type of unfettered music experimentation that has led to these long tail artists being discovered. A percentage-of-revenue structure supports the democratization of all types of music for all creators in the industry, not just a select few.

Now, Your Honors, I'm going to proceed to a session of Spotify restricted information and then all restricted information.

JUDGE BARNETT: Once again, ladies and gentlemen, we will be closing the hearing room.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

AFTERNOON SESSION

(1:15 p.m.)

JUDGE BARNETT: Good afternoon. Please be seated. Oh, we have amplification.

Mr. Steinthal?

MR. STEINTHAL: Thank you.

JUDGE BARNETT: Will you be open or --

MR. STEINTHAL: Open throughout.

JUDGE BARNETT: Terrific. Thank you.

CLOSING ARGUMENT ON BEHALF OF GOOGLE

MR. STEINTHAL: Good afternoon, Your Honors.

This afternoon I am going to cover three topics. First, recognizing that you've already heard from other Services to some extent on the Phonorecords I and Phonorecords II settlements, and the Subpart A settlement in this proceeding, I will briefly discuss some other aspects of those agreements and the negotiations leading up to them, and how they provide important context and support for the Services' proposals in this case, save Apple's.

Second, I will explain Google's amended proposal and the ample record evidence to support

it. And, third, I will address the Copyright Owners' critiques of the Services' proposals.

The Panel heard a lot of testimony during the hearing from both sides about the industry-wide Phonorecords I and II agreements. Those agreements provide important benchmarks, as Mr. Marks discussed, so the Panel need not reinvent the wheel in setting rates in this case.

I will focus briefly on a slightly different issue, of the Copyright Owners' attempt to run from the bargains they struck in the past in Phonorecords I and II and the Subpart A settlement here.

First, the Copyright Owners over and again have proclaimed that the streaming world has changed dramatically since 2008 and even since 2012. The Copyright Owners contend that the Phonorecords I and II agreements should be ignored because they effectively didn't know what they were doing back in 2008 and 2012.

You will recall that Mr. Israelite and Mr. Brodsky testified initially that they could not, nor could anyone foresee, one, that large tech companies would enter the market; two, that ad-supported models would exist; and, three, that

revenue attribution issues would arise.

But let's look at slide 2 and 3, because the hearing evidence shows directly the contrary of those positions. This is an excerpt of Mr. Israelite's testimony. When I questioned him regarding NMPA's expert's own testimony in the Phonorecords I case, you will see -- and I hope you will recall -- that he recognized that the experts that he had retained, that NMPA had retained, had recognized that subscription-based services pursue a variety of revenue models, the principal objectives of companies such as Yahoo is to attract users to its site in order to sell on-line advertising, and concerns about aggressively pricing their offerings in order to maximize subscriber numbers.

And he acknowledged that these were concerns articulated by NMPA's own experts prior to the Phonorecords I settlement. And slide 3 has more of the same testimony from Mr. Israelite, acknowledging that NMPA's experts knew all about that at the time.

Mr. Israelite's testimony and that of the NMPA experts thus reflect that back in 2008 tech giants like AOL and Yahoo had already entered the interactive streaming market and ad-supported

streaming models existed and, of course, were even accounted for as a separate service category under the ultimate agreed-upon Phonorecords I rate structure.

The evidence thus clearly shows that NMPA foresaw the very revenue attribution issues it complains of today back in 2008 when the Phonorecord I rate structure was developed.

After the trial reflected that the Copyright Owners had foreseen these issues, the Copyright Owners reversed course in their post-trial findings and now claim that what people foresaw or didn't foresee is "irrelevant." Over and again we see that in their post-trial positions.

But that the parties anticipated and dealt with these issues both in Phonorecords I and Phonorecords II, as I will get to in a moment, is relevant, as is the fact that the Copyright Owners' positions and testimony to the contrary lacks credibility.

Then after watching the industry operate under the Phonorecords I structure for years, the Copyright Owners willingly rolled over similar rates and terms in the Phonorecords II settlement. It is undisputed that the negotiations leading to

Phonorecords II and the settlement focused on refining the Phonorecords I agreement and on adding new service categories to accommodate emerging offerings that were addressed in the Phonorecords II settlement.

The testimony at the hearing, including from Mr. Israelite, Mr. Parness, and Ms. Levine demonstrated that the Phonorecords II negotiations took over a year. Importantly, among other things, the parties negotiated changes to address the Copyright Owners' concerns about capturing different types of payments to record labels in calculating TCC, the total label payment provision.

Indeed, the Copyright Owners' current claims of how TCC does not protect them because of the failure to address compensation in the form of equity, advances, and the like is flatly belied by the very specific TCCI, TCC integrity definitional changes they sought and achieved in the Phonorecords II settlement.

Let's take a look at slide 4, defining TCC to include the new provision called "applicable consideration." This is a new provision added in the 2012 settlement agreement. And it makes clear that applicable consideration means "anything of

value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or non-monetary consideration," et cetera.

Confronted with this at the hearing, the Copyright Owners switched tactics again to argue that the non-precedential language in the Phonorecords I settlement applies in perpetuity and barred use of even the Phonorecords II settlement as a benchmark.

But this position cannot be reconciled with the plain language of the parties' agreements, as Mr. Marks explained earlier, because the Copyright Owners' argument that the Phonorecords II settlement was intended to be non-precedential fails as a matter of law, since the express terms of the Phonorecords II settlement with its integration clause comprise the entire agreement of the parties and supersede all prior agreements.

JUDGE STRICKLER: Counsel, in the slide with the definition of "applicable consideration," this is part and parcel of the 2012 settlement?

MR. STEINTHAL: Yes, it is. It was added.

JUDGE STRICKLER: With the existing regulations?

MR. STEINTHAL: It is.

JUDGE FEDER: The cites are right there.

JUDGE STRICKLER: Thank you. Do you know whether the record reflects that any Services have, in fact, made any payments pursuant to a revenue-based or in any other way that includes ownership, value ownership equity?

MR. STEINTHAL: I don't, as I stand here today know, but certainly there are some Services that have paid under the TCC prong under the Phonorecords II settlement. And Services would also, insofar as doing a top-line calculation of greater of 10 and a half percent or the lesser of the TCC and the per-subscriber number, would have to do some calculations. And there is no record evidence --

JUDGE STRICKLER: One way or another?

MR. STEINTHAL: Yeah. I mean, there is no evidence, and I will come to that later in the context of some of the testimony that was given by Mr. Kokakis and Mr. Brodsky, there is no evidence in the record at all, even when the labels have an audit right, because let's remember most of the

major publishers are licensing directly to Services like Google and others for the rights covered by Section 115.

And in those agreements, it is quite common for the publishers to demand an audit right. And there was no evidence, even with the benefit of that audit right, that any publisher challenged the calculations that were being made under this regulation for purposes of the Services' performance under those direct licenses.

JUDGE STRICKLER: You are saying the direct licenses between publishers and streaming services that are in the record, some of them include audit rights, and there is no evidence that those audit rights were ever triggered by the publishers?

MR. STEINTHAL: Correct.

JUDGE STRICKLER: And my same question with regard to monetary advances. Are you aware of anything in the record in this proceeding in which monetary advances were specifically incorporated into a revenue base or any other royalty calculation?

MR. STEINTHAL: Again, the obligation existed under this definition. And there is no

evidence that the Services did not perform under their direct license agreements with others or under the statutory provisions to make the calculations necessary to determine what prong they pay under.

JUDGE STRICKLER: My question wasn't in any sense argumentative. I am just trying to figure out what is in the record that maybe we potentially overlooked, because I didn't see any record evidence of that as well.

Same question with regard to barter. Are you aware of any evidence in the record that the value of something that was bartered was put into a revenue base or any other royalty measurement for royalties paid by Services?

MR. STEINTHAL: Not one way or the other.

JUDGE STRICKLER: How about any other non-monetary considerations?

MR. STEINTHAL: Again, I think that the evidence is that the publishers sought this provision, so they would get the benefit of the -- of obligating the Services to include all these parts of consideration in the calculations.

We didn't get into in the record any specific reports, I don't think, that Services made and how they did the calculations.

If any of the other counsel can, you know, address that in greater detail, that's fine, but I don't recall that.

JUDGE STRICKLER: Thank you.

MR. STEINTHAL: So I'd like now to move to Google's proposal and the Subpart A settlement agreement. The elements of Google's amended proposal are set forth in our papers and on slide number 6.

Very briefly, it is the greater of 10.5 percent of net service revenue or 15 percent of label payments with a deduction for public performance rights payments.

My colleagues have already addressed the extensive record support for such an all-in rate structure, inclusive of a public performance rights deduction and for a headline percentage-of-revenue rate structure.

In the interest of time, I have shortened my initial outline, and I refer the Panel to Google's proposed findings of fact on this topic. And, in particular, Dr. Leonard's testimony featured therein in support of both an all-in structure and a percentage-of-revenue structure.

JUDGE STRICKLER: Are you also referring

us to Dr. Leonard's testimony with regard to the specific construction of the 10.5 percent figure and the 15 percent figure?

MR. STEINTHAL: I am going to come to that right now in a little bit more detail.

JUDGE STRICKLER: Thank you.

MR. STEINTHAL: As you anticipated, I do want to address with greater specificity, and as Mr. Marks said I would, how the recent Subpart A settlement supports the 10.5 percent headline percentage-of-revenue rate in both Google's and other Services' proposals.

The Subpart A settlement for permanent digital downloads spans precisely the same statutory license period, the same licensors, licensing all the rights necessary for highly comparable use.

Dr. Leonard calculated that expressed as a percentage of the gross revenue from the sale of permanent digital downloads, the Subpart A settlement reflects an all-in payment to Copyright Owners of 8.7 percent of the gross revenue from permanent digital download sales as of 2015, and the calculations are in the proposed findings. You look at the average royalty of 9.5 cents as a percentage of the average sales price.

Compared to this figure, the existing 10 and a half percent rate from Subpart B and as contained in the thousands of direct licenses entered into during the past two statutory license period is conservative.

I will address briefly Google's proposed deduction from gross revenue for purposes of calculating service fees. The conservative nature of the 10 and a half percent of revenue proposal supports the adoption of a revenue deduction of up to 15 percent of revenue for certain costs directly associated with stimulating revenue growth.

The existing regulations and other music licensing agreements recognize such a deduction for costs of advertising sales by ad-supported services.

Other music licenses extend a similar revenue deduction to analogous costs associated with subscriber acquisition and retention, such as credit card fees that Services pay in order to facilitate revenue generation. This is covered in Google Proposed Finding of Fact 41.

Google's proposal is to bring all the categories of interactive streaming services licensed under Section 115 in line with ad-supported models under Subpart B that have traditionally

received this type of deduction.

Dr. Leonard specifically accounted for this revenue deduction in his Subpart A benchmark analysis and found, as excerpted on slide 10, that a 10 and a half percent rate was well within the range of reasonable rates, even assuming a maximum 15 percent deduction, as Dr. Leonard addressed at page 1109 of his live testimony.

The second prong of Google's amended rate proposal is an uncapped 15 percent of TCC prong. Let's take a look at slide 11 for this purpose.

During Dr. Leonard's testimony, Judge Barnett questioned how the Judges could set appropriate minima and floors and revenue percentages for all the myriad types of services covered by the current regulations.

In response, Dr. Leonard volunteered, as shown on the slide 11 excerpt of his testimony, that the TCC prong could protect against this variability.

A TCC rate of 15 percent aligns with the Subpart A benchmark, which is crucial in light of the removal of the per-subscriber caps that protected licensees as provided for under Google's proposal.

JUDGE STRICKLER: Counsel, question for you on the slide. They are not numbered, I think you said it was 11, but at least on this paper that I have, but where Judge Barnett asks the question why not start there then for everyone? And Dr. Leonard responds: "Well, I think if you were to get that percentage correct, that that wouldn't necessarily be a bad way to go either."

Can you refer us to anything in the record or anything in the proposed findings that cites to the record as to evidence that suggests a percentage of TCC that would be correct industry-wide in lieu of a more complicated formula?

MR. STEINTHAL: Well, that's what we proposed in our Google amended proposal. We looked at using Subpart A as the benchmark. It is the same licensors, same time period, under the same statute and 801(b) factors. And as I will come to, I will address all of the Copyright Owners' criticisms of this Subpart A settlement, but they came to you last year and earlier this year for your support to bless a settlement they reached with the major record labels.

And that settlement reflects a very recent benchmark whereby the Copyright Owners are

getting paid 9.1 cents per sale with, you know, with the additional fees for longer songs that average out at about 9 and a half percent -- I'm sorry, 9.5 cents.

And when you look at what that reflects -- and the Copyright Owners' mischaracterize what we did. They say: Well, you are looking at the royalty to the publishers as against the revenues of the labels.

No, we're not. We're looking at what is that 9.5 cents in average royalty for a PDD sale as against what is the average royalty for the label when it comes to selling a PDD? And we know from the evidence that it is generally about 70 percent of the sales price.

We can calculate what the ratio is of the 9.5 cents as against the sale price times 70 percent. And then you deduct the 9.5 cents because what you are looking at is what is the royalty that the labels are generating from the sale of a PDD.

And his math, as covered by slide 12, yields a range of TCC ratios of 14.2 to 15.8 percent. And that's -- he explains it at page 1115 of his live testimony. And that is going down.

That ratio tends to be going down.

So the 15 percent TCC is fully supported by all the evidence that flows from the Subpart A settlement, where we have absolute information that this is what the publishers are receiving, this is the royalty that is generated by the labels. We see that the relationship between the two is 15 percent.

JUDGE STRICKLER: And does that mean that in slide 11 when you referred back to Dr. Leonard's testimony where he says well, I think if you were to get that percentage correct, you are saying the implication from that sentence is that he is saying correct means the 15 percent that Google has proposed?

MR. STEINTHAL: Yes. And we went back and took Your Honor's request to consider amendments to our rate proposals to heart. We felt that, for reasons I will get to in a moment, the approach set forth in Google's proposal provides for great flexibility.

It protects against some of the concerns that Your Honors have articulated about revenue deferment, about revenue attribution. It enables you to be comfortable with the elimination of the floors, which have created some aberrational results

because at the end of the day the labels are going to protect their own self-interests.

The labels are going to make sure that if they are going to license some new business model or a free business model or a bundled business model, they are only going to do it if it is in their self-interest to do it at prices and price structures that work for them.

So what have we seen? We have seen that the labels with respect to bundles and free services often require that those services have less functionality than a full 10 dollar all-you-can-eat service offering.

We have seen in some limited instances that labels have insisted on a per-play. The Copyright Owners make a big deal about that. It only happens a few times, but, you know what? If the labels to protect their self-interest decide that they are going to go down the path of per-play or they are going to go down the path of per-subscriber, or it is a greater of and the percentage-of-revenue is what triggers the ultimate payment, the publishers ride the coattails and are protected, but it has got to be at the lower -- if we uncap the component, because remember under the

old regs, the TCC was capped at 80 cents per-subscriber because of that lesser-of component of that Level 1. So rarely was the TCC component triggered.

Now, this is a proposal whereby you can be comfortable that for all of the unknowns that the publishers have claimed that we need protection against, you know, free, we need protection against bundles, well, we can rely on the labels for that. That's for sure. They are not going to do anything that is against their self-interest.

And what we have from Subpart A, which is what makes this proposal so persuasive, is very recent evidence of what the ratio really is for the identical Section 115 rights for a service offering that I will get to in a moment, everybody has conceded is substitutional one for the other.

We have a great model here. And to the extent that the Panel wanted to find a way to not have -- I hate to quote you on this, Judge Barnett, six wakes from Sunday on ways in which we, you know, there are different categories with different per sub minimums, this or that, this approach enables you to be flexible, provides the Copyright Owners with the correct, to use Dr. Leonard's words, the

correct relationship of compensation for the publishers and writers as against the labels for the identical Section 115 context.

JUDGE STRICKLER: I want to make sure I understand your argument completely as it relates to the distinction between the structure as you have proposed and the rates within the structure.

Is it your position, is it Google's position that this structure having the greater-of percent of revenue or of the TCC is a good structure, regardless of whether the Judges ultimately find those percentages should be or is it your position that this is a good structure only provided that it is these particular rates?

MR. STEINTHAL: It is the latter. I mean, we can't have a situation, for example, a hypothetical where you are going to say, geez, great idea, but let's keep the 21 and 22 percent of TCC. That would be fundamentally inconsistent with the benchmarks because you would end up with a TCC swallowing the 10-and-a-half-percent rate.

JUDGE STRICKLER: You are saying it is a rate structure that works but only with these particular rates?

MR. STEINTHAL: Yes.

JUDGE STRICKLER: Thank you.

MR. STEINTHAL: Now, knowing the primary support for the 15 percent TCC rate is found in Subpart A, doing the math that I described and Dr. Leonard described in his testimony, it is also corroborated by the existing Subpart B rate as discussed in Google Proposed Finding of Fact 48.

By that I'm referring to the standard rates right now where you have under a standard label plan, you end up paying, the Service pays $5.50 per-subscriber to the label and you have got a TCC component under the first level, under the old regs that capped out at 80 cents per-subscriber.

If you do the 80 cents as against that $5.50, you get to a number -- I'm sorry, if you take the 15 percent that Dr. Leonard is proposing and apply it to that $5.50 percent standard fair payment to the label, you would end up with a fee of .825 cents, which shows you that the 15 percent figure dovetails quite well from the Subpart B analysis to the approach that Dr. Leonard has proposed, which is 15 percent looks like the right number. It looks like that under Subpart A it works, under Subpart B, the folks are traditionally paying based on, you know, no more of a TCC than 80 cents per sub would

generate, you'd end up at the same place.

Now, I want to turn to the key criticisms that have been levied by the Copyright Owners against Google's and others' proposals. First, the Copyright Owners critique the percentage-of-revenue rate structures that have been offered by all of the Services, save Apple.

But that attack is a straw man. Every Service proposal involving a percentage-of-revenue rate includes a greater-of structure against other alternatives. It is not a naked percentage-of-revenue structure.

Google's uncapped TCC prong means that whatever the record labels are being paid by a given Service and whatever the royalty structure, as I mentioned before, whether it be revenue-based per-subscriber or per-play, the publishers are guaranteed a fair payment.

This leads me to the Copyright Owners' critiques of the TCC prong. Throughout the trial, the Copyright Owners' biggest critique of the TCC prong under the old regs was that it was capped. And in their opinion, this meant it did not come into play enough.

But Google has addressed this by removing

the cap. And the Copyright Owners can always count on a minimum payment that is equal to their relative contribution under Subpart A, which is 15 percent.

Copyright Owners are also wrong to claim that there is a lack of transparency into the amounts paid to the labels. As I mentioned earlier, we had testimony from Mr. Brodsky that the publishers have the right in their direct agreements with Services that include capped TCC provisions to audit the Services to determine if label payments are being calculated to capture all value to the labels, and the Copyright Owners provided no evidence of any actual instance of TCC being miscalculated or even that audit rights have ever been exercised.

And, importantly as discussed earlier, the Copyright Owners requested as part of the Phonorecords II settlement and were granted TCCI, as it was called, integrity in defining the components of label payments.

And also TCC calculations were tied and would still be tied under Google's proposal to the widely accepted GAAP accounting principles, but simply any claim about a lack of transparency is entirely hypothetical and divorced from the

evidentiary record.

Next, Copyright Owners also complain that relying too heavily on the TCC prong unfairly ties the publishers to the rates agreed to by the labels and denies publishers the ability to control their own fate. But this gets things backwards.

The predicate for Copyright Owners even having a mechanical right was that the right would be subject to compulsory; that is, involuntary licensing and rate setting.

Congress's unequivocal intent is that the publishers cannot control whether to license their mechanical rights or the rate that is charged for statutory mechanical licenses. Since its creation in 1909, the mechanical right has always been subject to a compulsory licensing scheme.

As detailed in the Services' joint proposed findings of fact, Congress has always recognized the potential for anticompetitive conduct if the rights to musical works can be held up by the publishers.

The Copyright Owners' final critiques of the TCC prong are just theoretical. They argue that labels own a small percentage of Spotify and, therefore, will give a sweetheart deal to Spotify.

But the evidence at trial roundly debunked this theory, both given the fiduciary duties that labels owe to their artists and the ludicrous proposition that they would risk current rewards in their core business for speculative future benefits flowing from their very small ownership interest. Some of this is captured in a slide we're not going to put up because it has restricted information, which is slide 15.

What then? Grasping at straws, the Copyright Owners hypothesize that the Services might launch their own record labels for purposes of undermining the TCC prong. And I don't think I exaggerate when I say this agreement -- this argument verges on paranoia.

Even if the Services were to begin running record labels, there is no likelihood that these record labels would somehow control the rights to any meaningful percentage of the songs played on the Services within this license period.

JUDGE STRICKLER: On the odd chance that it is not paranoia, would Google have any objection to a term in the regulations which says -- which says that if there is an affiliation between a Service and a record label, as appropriately defined

to address what you have characterized as paranoia, would Google have an objection to that to make sure that such a vertical integration doesn't occur?

MR. STEINTHAL: Well, I'm sure we wouldn't have an objection to provisions that would fairly attribute the calculation of TCC. I think, you know, to bar a company from acquiring, even if it is a small record company, is a different kettle of fish.

JUDGE STRICKLER: No, I don't mean to say -- we don't have that authority to do that. I am talking about how we define and calculate revenue for purposes of applying TCC.

MR. STEINTHAL: I'm sure we could come up with a solution for that. We're not trying to game the system. I think that the Copyright Owners are either suggesting that the sound recordings and the embedded compositions are so fungible that a group of streaming services could supplant the major record labels on a whim in order only to pay under the percentage-of-revenue prong, rather than the TCC prong because, remember, it is the greater-of a percentage-of-revenue or the TCC component.

And it is inconceivable to me that that's going to happen. And certainly the Services aren't

going to be willing to run themselves into the ground by just playing music that they may be able to acquire from self-purchased small record labels, but, Your Honor, I'm sure that TCC integrity should cover any such concerns associated with Service ownership of record labels.

JUDGE STRICKLER: Thank you.

MR. STEINTHAL: Finally, and most important of all, perhaps, I want to address the Copyright Owners critique of Google for relying as a benchmark on the Copyright Owners' Subpart A agreement with the major record labels that extended the Subpart A rates in this proceeding from Phonorecords I and Phonorecords II through the end of 2022.

They claim that Subpart A and Subpart B activities are fundamentally dissimilar. These critiques fail. First, the Copyright Owners are not correct as they assert in their reply submission that Subpart A is a poor benchmark because digital downloads and streaming are not substitutes. That's what they say in their reply.

The record is replete with evidence of the substitutability between the purchase of digital downloads and on-demand streaming access, a point

made by the Services and the Copyright Owner witnesses alike.

But apparently desperate to avoid the Panel's application of the Subpart A settlement here, and despite admitting in their initial proposed findings that interactive streaming and downloads are substitutes, the Copyright Owners now say they, quote, have never claimed that interactive streaming and downloads are substitutes.

Let's take a look at slides 17 and 18. This one I want people to pause and read. On slide 17 we see Copyright Owners' reply to Google's proposed findings of fact and conclusions of law. This is what they say in their reply submission. "Copyright Owners have never claimed that PDDs and interactive streaming are substitutes for one another."

But let's take a look at their prior proposed findings of fact where they proclaimed, "The data obtained from both the NMPA and music publishers confirms that mechanical royalties from physical records and digital downloads have dropped as interactive streaming has substituted for the purchases of physical records and digital downloads."

And then again, "The increase in the popularity of interactive streaming has resulted in a decline in revenues from digital downloads. This shift suggests that interactive streaming is a substitute for digital downloads."

And then continuing on to the next slide, skipping down to the Copyright Owners' proposed conclusions of law, the last box on the lower right. "Moreover, neither the Services nor their experts appear to dispute that interactive streaming serves as a substitute for digital downloads and physical products."

It is hard to imagine a more crystal clear and fundamental backtrack; once again, underscoring the fundamental lack of credibility in the Copyright Owners' submissions.

It is also telling on this score what happened in Phonorecords I. There, the Copyright Owners recognized the very interrelatedness between Subparts A and B that they now seek to run away from.

The Copyright Owners at that time made it an express condition of the Subpart B settlement -- let's remember what was happening there.

Subpart B settled in Phonorecords I and

Subpart A was being litigated. The Copyright Owners at that time made it an express condition of the Subpart B settlement that it remain confidential to avoid it becoming a benchmark in the ongoing Subpart A proceeding.

If it were true, as the Copyright Owners now posit, that Subparts A and B are not comparable, there would be no need for such a provision.

There is also the great irony that the Copyright Owners' critique of using Subpart A is belied by their own expert, Dr. Eisenach, who actually relies on the ringtone rate from Subpart A in his analysis.

And I will now turn to the next argument thrown up against the use of Subpart A as a benchmark. Copyright Owners claim Subpart A is a bad benchmark because the amounts involved didn't warrant litigating to reach a fair rate in light of declining album and single sales. But they are estopped from arguing that the Subpart A rates are not fair or otherwise do not meet the 801(b) factors.

Copyright Owners earlier in these proceedings represented to this Panel that the Subpart A rates to which they agreed in their

settlement with the labels satisfied the 801(b) objectives. They did so in the face of an objection to their proposed settlement by Mr. Johnson.

And they succeeded in having Your Honors recommend the adoption of those rates and terms for the next five years for the entire industry, including Mr. Johnson. The Copyright Owners, thus, are now estopped from arguing that they agreed to unfair rates or rates that were not consistent with the 801(b) factors because now they say they didn't believe it was worth litigating over.

Such a position is completely at odds with what they told the Board just months ago to secure approval of their settlement. Nor is it credible, back to credibility here, nor is it credible that, as the Copyright Owners now claim, and Mr. Marks alluded to earlier in his remarks, that Subpart A royalties are not worth fighting over.

I request the Panel to turn to slide 19 in your book. I am not going to put it up on the public record because it has confidential information.

JUDGE STRICKLER: Which one?

MR. STEINTHAL: Slide 19.

JUDGE STRICKLER: Maybe I am just missing it. I am not seeing the numbers.

JUDGE FEDER: Is it slide 19? It is the one titled Royalties.

JUDGE STRICKLER: Okay, I think the numbers are written on the blue, which is hard to see.

MR. STEINTHAL: It is a chart towards the very end.

JUDGE STRICKLER: And it is called Subpart A Royalties?

MR. STEINTHAL: Yes. This is from Trial Exhibit 306. And it is data produced by the NMPA. And it reflects that in 2015, the last full year for which we had data, the vast majority, and I mean vast majority, I don't want to say the number, of mechanical royalty income was generated by Subpart A activity.

Take a look at the right-hand column on what you are looking at. You will see there is 2015, and then there are numbers. One is in dollar figures and the other is in percentages.

And you will see if you add up the first three entries, physical permanent digital downloads and ringtones, that's the Subpart A activity. It

represents a very, very high percentage of the total mechanical royalties that the publishers are getting. And you will see that it generates hundreds of millions of dollars in royalty income to the Copyright Owners.

The bottom line is that while streaming mechanical royalties are growing at a faster pace in recent years, the plain reality is that Subpart A activity is not the triviality that Mr. Israelite suggested in seeking to run away from the Subpart A settlement.

Lastly, the Copyright Owners tried to distinguish Subpart A as an ownership model and Subpart B as an access model, but this is a false dichotomy. Dr. Leonard explained, as excerpted on slide 20, which is the one that follows the slide that you were just looking at --

JUDGE STRICKLER: So 20 follows 19, just the way you laid it out.

MR. STEINTHAL: Yes. It doesn't always work that way but this time it did.

Dr. Leonard explained, as excerpted on slide 20, that this ownership versus access differentiation is more semantic than it is substantive when considering the comparability from

a consumer perspective.

As he described, and I quote, with a PDD, a user pays a price for access to a track by purchasing the PDD and then can listen to the track as often as desired over an unlimited time.

While with a subscription streaming service, a user pays a price for access to a library for a given time period by purchasing a subscription instead of a la carte downloads and then can listen to any track in the Services' library as often as desired within that time period.

Furthermore, to the extent that there is a difference between streaming and digital downloads due to access to vast catalogues, that is a value that the Services provide.

Let's remember that a Section 115 license is a work-by-work license that provides access to one song at a time. You may recall the cross-examination of Mr. Israelite on this issue.

This is not a Section 114 blanket license. This is a song-by-song compulsory license.

For purposes of applying the 801(b) objectives here, it is the Services that supply any access value. They are the ones that have to go get licenses song by song and put them together to

provide for a broader catalogue of access along the lines that the all-you-can-eat Services have offered.

And it is the Services that bear the risk of an infringement liability if they do not properly license each and every copyrighted composition on their Services. Moreover, not even the Copyright Owners' proposal compensates songwriters for the supposed value of access.

The existing regulations and every single proposal proffered in this proceeding would pay only those songwriters whose works are actually played during a given reporting period.

Finally, in an effort to synch Dr. Leonard's calculations related to Subpart A, Copyright Owners cast aspersions on his use of RIAA pricing data claiming that this data only reflects estimates. This is yet another late-in-the-day argument that has no foundation in the record.

Nowhere in the record can Copyright Owners point to any evidence that the RIAA data is inaccurate or that its estimates are materially different than actual average prices. And, again, Copyright Owners gloss over the fact that their own expert, Dr. Eisenach, relies on precisely this same

data, as we will see in slide 21, as did Dr. Marx. There is simply no there there to the Copyright Owners' argument.

In summing up, the Copyright Owners' final critique of Google's amended proposal seems to be that Google amended its proposal at all. Google's decision to amend its proposal is not in any way an admission that a prior proposal did not satisfy the 801(b) objectives.

The record demonstrates that Google's amended proposal, like its prior proposal, and the proposals of Amazon, Pandora, and Spotify, all satisfy the 801(b) objectives.

Google accepted the Panel's invitation, see slide 22, to address concerns that the Panel articulated during the proceeding. And Google made incremental modifications to its proposal to accomplish those goals.

Google's amended proposal creates a flexible rate structure to accommodate different business models, which is essential to capturing revenue from consumers along the demand curve with different willingness to pay.

Finally, each element of Google's amended proposal is supported by evidence admitted at the

hearing. The Copyright Owners' refrain in their reply submission that there is no evidence to support Google's amended proposal insofar as it was offered after the record closed misses the point that the same evidence submitted in support of Google's initial proposal also fully supports Google's amended proposal.

The Copyright Owners' argument ignores this and seems to question the sincerity of the Panel's invitation to the participants to amend their proposals.

If anything, the Copyright Owners should defend why in the face of the Panel's entreaty they have done nothing to amend their proposal. That's all I have. I am happy to answer any further questions that the Panel may have.

JUDGE BARNETT: Thank you, Mr. Steinthal.

MR. STEINTHAL: Thank you.

JUDGE BARNETT: Ms. Cendali?

MS. CENDALI: Thank you.

MR. SEMEL: Not to be a nag but we go last. So we're now already at the point where they have taken half the entire day, and so now we're eating into the unfair part of our half of the taking side, so I would ask this going over by

double just stop.

At a certain point we need to get our closing in. And I can't come back tomorrow. We only scheduled it for one day. So I would ask that we not run through the rest of the day. I think they are an hour on and a half or two hours over already.

JUDGE BARNETT: Do you have more than two hours?

MR. SEMEL: Look, I will do my best to fit it in. I am just pleading for some --

JUDGE BARNETT: We're going to finish this.

MR. SEMEL: Thank you, Your Honor. I hate to be a nag, but we go last.

JUDGE BARNETT: Ms. Cendali, open or closed door?

MS. CENDALI: It is open.

CLOSING ARGUMENT ON BEHALF OF APPLE

MS. CENDALI: Good afternoon, Your Honors. Our plan is we should be -- Erica, have you distributed all the handouts?

Our plan is there may be some of the handouts that will be, and I will refer you to them as restricted, so only you will see them. And they

won't be on the screen. But that way everyone will be able to stay in the courtroom.

JUDGE BARNETT: Thank you.

MS. CENDALI: Thank you. Are we set? Thank you.

Your Honors, Apple has long been a leader and visionary in the digital music space and for the benefit of everyone. It is thus not surprising that of all the proposals this Board has received, Apple's proposal uniquely recognizes the symbiotic relationship between Copyright Owners and Copyright Users.

The 801(b) factors that govern this proceeding shown here in closing demo 1 recognize that symbiotic relationship, emphasizing and balancing both Owners and Services in their analysis.

As Your Honors know, Apple proposes a .00091 all-in per-play rate for non-fraudulent streams 30 seconds or longer for all interactive streaming services. As I promised during my opening, Apple's witnesses explained how its proposal satisfies the 801(b) factors.

And I will summarize these points throughout my presentation and in detail at the end

of my presentation.

But, first, I want to walk through the four key aspects of Apple's proposal to highlight the evidence in support of it and contrast that to the Copyright Owners lack of evidence on the other side.

So let's start with Apple's proposal for a uniform per-play rate structure for all interactive streaming services. As you have heard from David Dorn, Apple's senior director of Apple Music, Apple's experts, Dr. Ghose from NYU and Dr. Ramaprasad from McGill, and even witnesses from the Copyright Owners, there are a lot of problems with the current rate structure as shown on demo 4.

First, it leads to variable rates across Services and time periods, which leads to a lack of trust between songwriters and Services, which can reduce the incentives to create and distribute music.

Second, it delinks compensation and demand, a fundamental economic principle. Third, it misallocates risks and rewards because Copyright Owners under the current system have to share involuntarily in the Services perhaps risky business decisions, and the Services don't get to reap the

full up-side of their investments.

Further, the current system is overly complicated and lacks transparency, harming incentives. Fifth, it assigns different rates to different Services, which creates an unequal playing field.

By contrast, as explained by witnesses for both Apple and the Copyright Owners, a uniform per-play rate solves these problems as summarized in demo 5.

First, a uniform per-play rate prevents rate fluctuations, which improves incentives for all to make music available via interactive streaming. Second, it links compensation to demand, guaranteeing Copyright Owners fair income under factor 2.

Third, it properly allocates risks and rewards because as shown in this demonstrative from Dr. Ghose, Copyright Owners are protected from downside risks while Services get to keep any upside that they generate.

Fourth, Apple's proposal is transparent and easy to implement and understand, which improves incentives and limits disruption. It radically simplifies the current existing rate structure,

replacing all the complicated steps required just to get to the all-in rate for a single number.

Faced with this overwhelming logic, other Services disparage Apple's proposal as one-size-fits-all. In fact, it levels the playing field. It is business model agnostic. This is a virtue, not a vice. Services pay the same price for the same good. This is fair.

Moreover, Apple's per-play proposal is consistent with the per-unit royalty structure for other forms of music distribution, such as CDs and downloads, which helps make this non-disruptive.

And as shown in demo 7, it is consistent with CRB precedent in Phono I, Web II, and Web IV, which repeatedly has adopted a per-play or per-unit rate with no other prongs.

JUDGE STRICKLER: Ms. Cendali, is there evidence in the record about whether or not Apple provides discounts in the downstream market to consumers for buying subscriptions, whether family plans or student plans?

MS. CENDALI: Yes, Mr. Dorn testified that Apple had various tiers of services, including family plans and student plans, as well as the full subscription plans. And as you will hear me say,

those different types of offerings help lead to the ability to be flexible if the rate is set low enough to provide incentives.

JUDGE STRICKLER: So Apple believes in the downstream market it makes sense to charge a different price per unit of music listened to per-play in order to promote its economic interests, but such a structure in the upstream market would be inappropriate?

MS. CENDALI: You can't -- that is apples and oranges. And I think it is not just Apple, I think it is the Copyright Owners -- pardon the expression apples and oranges, it happens all the time when you represent Apple but it is still a good expression.

The goal is to incentivize people to buy but to buy at a right price. What is that old joke, I lose money on every sale but I make it up on volume? I don't think that's good economics. And that's not what Apple is proposing here.

But there is different flexibility within the system, which our proposal at the right rate would support.

JUDGE STRICKLER: So there are markets Apple understands in which it makes sense to charge

different per-play rates, but it happens to be at the downstream market when Apple is trying to promote a student to listen or families to listen, but it is not appropriate in the upstream market?

MS. CENDALI: No, maybe I am not clear.

JUDGE STRICKLER: Maybe I am not hearing it right.

MS. CENDALI: In Apple's proposal, it would pay the Copyright Owners the same under any --

JUDGE STRICKLER: Well, I understand that.

MS. CENDALI: Under all those plans. It is the same unit, the same song. They get paid the same amount. It is up to us as we rationalize our business or them, as they rationalize their business to, to say, you know what, I will pay a little bit more for this than I may be getting, but I think I can lure them to something else down the road and then that does it.

I don't think that's the same context as what you are talking about here.

JUDGE STRICKLER: We may be talking past each other because I am talking different context. You are saying -- and I am trying to understand whether Apple believes there is a universality, as

you suggested in your opening a moment ago that there is a universality to the fundamental fairness and appropriateness of charging the same price for a per-play.

And it seems to me that Apple is saying, well, not in the downstream market because we reserve the right, it is our service, we will do it as we think is best for us, which is of course fine to charge different prices per-play if you are a student or family plan or individual plan or whatever other types of plans that Apple thinks are appropriate.

So you do have -- it is not economically inappropriate to have different prices. You are saying it is economically inappropriate to have different prices per-play in the upstream market?

MS. CENDALI: Maybe we are talking past each other, but all Apple is saying, it is pretty simple, there should be the same price for the same song no matter what the context is in terms of paying the Copyright Owners. And that's fair.

And with that, from that, you can incentivize -- you can innovate in different ways and play that as you wish. What you are talking about seems to be a different context. And the

context that we're emphasizing is the idea that if you are offering the same good, you should be able to, you know, pay the same price for it. And there shouldn't be variability.

I mean, Apple shouldn't have to pay X and somebody X minus 10 or X plus 10. It is still the same good. And, otherwise, you can have, again, people saying: I have a great offer, I will charge you, you know, 10 cents under cost or something like that. And I don't think that's healthy for any economic system.

JUDGE STRICKLER: Thank you.

MS. CENDALI: Now, I do want to note that Mr. Mancini at one point in his presentation mentioned SDARS for the idea that that supported a percentage-of-revenue approach by the CRB.

Actually, in SDARS I, the CRB did adopt a percentage-of-revenue rate, but only because it said that there wasn't a good way to measure plays. As the CRB said there, it had to adopt "a proxy for measuring the value of the rights used." Here we don't need that proxy because it is easy to measure the plays. And that's at 4085, if you want the cite.

Similarly, in SDARS II, the CRB made a

similar argument, "a proxy for use of sound recordings must be adopted because technological impediments do not permit implementation of a per-performance fee." That's at 23079.

Again, suggesting where you can do it, a per-performance fee, per-unit fee is what makes sense. In any case, although Apple agrees with the Copyright Owners that a per-play rate applicable to all Services makes sense, Apple disagrees with the Copyright Owners' addition of a per-user prong because it would lead to the same problems as the current structure.

First, it would lead, again, to fluctuating unpredictable rates, as shown in this demonstrative from Dr. Ghose's testimony. Second, it would de-link compensation and demand and cause, as you can see, royalties to decrease, even though streaming might increase, which doesn't make sense.

And, third, as shown, it doesn't properly allocate risk and rewards because Services would have to pay even for users who don't listen to any music in a given month.

Fourth, the per-user prong adds complexity and confusion to the rate structure. Fifth, it is not business model agnostic because not

all Services charge subscription fees. Rather than encouraging pricing innovation, a per-user rate forces all Services towards a subscription model limiting the number of streaming options.

Apple's position with regard to the per-user prong, moreover, is supported by CRB precedent in Web II where the CRB rejected a greater-of proposal with a per-user prong, as it was duplicative because it was to be allocated per-play, as you can see on Apple closing demo 11.

Equally flawed is the Copyright Owners' claim that a per-user prong is necessary to compensate Copyright Owners for the access value of their music. I think Mr. Steinthal touched on this a little bit.

This access argument is internally inconsistent and makes no sense. If Copyright Owners really believes their access argument, then any songwriter with music available in a catalogue on a service should under their theory get royalties from that service regardless of whether their music is played, but that is not what they are proposing.

The Copyright Owners want to allocate the money collected per-play as they know it is the plays that matter. Second, it makes no sense to pay

songwriters and publishers royalties if their music isn't played, as Dr. Ghose testified.

Third, the Services are the ones that make the access possible by making the financial and technological investments in developing features like music discovery and fan engagement tools.

So under the third 801(b) factor, they should reap the benefits of these contributions, not the Copyright Owners.

The Copyright Owners also try to twist Apple's music locker proposal to argue that Apple and its expert, Dr. Ghose, believe that a per-user rate should be adopted to any -- for any service that let's users access music. But, again, they are comparing apples to oranges or apples to kumquats or kumquats to oranges, pick whatever.

As Dr. Ghose explained, a per-user rate in Apple's paid locker proposal reflects the value of being able to store music you own. This storage value is not something interactive streaming services provide, as Dr. Ghose made clear.

And unlike with streaming, all paid locker services are subscription services. So a per-subscriber rate makes at least some sense in that different context.

Now, when you look at the evidence, it is clear that what the -- that the Copyright Owners' plea for a per-user rate is really just an effort to jack up the per-play rate to unfairly and disruptively high levels.

Let's look at closing demo 15. And you can see the per-user prong would apply, and lets consumers average more than 707 streams per-user per month. That's a lot, even for my teenagers.

And that means Services generally will be paying much more than the already high .0015 per-play that the Copyright Owners ostensibly propose. That the per-user prong would usually apply is also supported by the restricted evidence shown on Your Honor's handouts on Apple Demonstrative 16. There is financial information there about the number of the plays.

Turning to the other Services' arguments, well, they make a lot of sky-is-falling arguments against a per-play rate in general and Apple's proposal for a uniform .0091 per-play rate in particular. These arguments all fail.

First, they claim a per-play rate would force Services to limit consumption, but it would be pretty foolish for Services to limit streams when

what they are selling is streams, as Dr. Ghose, who has extensive real-world experience working with technology companies has testified.

Second, the Services argue that Apple's proposed per-play rate would destroy ad-supported services. This isn't true. As Mr. Dorn explained, Apple's per-play rate is a midpoint upon what the various Services pay.

Your Honors can see restricted information in addition to this regarding historical effective per-play data in your handouts at demo 19. Hopefully you can see corroboration on this.

Thus, because Apple is proposing a midpoint, companies can offset any increases in royalties for one of their offerings such as an ad-supported service with a decrease in royalties for a different offering. And the testimony of one of the other Services' own witnesses supports Apple's conclusion as shown on the restricted material on Your Honor's handouts in demonstrative 20.

By contrast, the Copyright Owners' proposal would not allow for this type of balancing because they propose a rate increase for every type of service plan. And that goes back to what, Your

Honor, we were talking about earlier, is that if you set the rate at the right level, there is the possible for innovation. If you set the rate so high, it makes it impossible.

If Your Honors want any further evidence that the other Services' claims are overblown, you need only look at the growth of the non-interactive streaming market, even as ad-supported services have paid per-play rates, as you can see on the next demonstrative.

Further, as Pandora's expert, Dr. Katz testified, a per-play rate aligns well with incentives for ad-supported services, which is why he supported it in Web IV, which is, again, reflected this time in Apple closing demonstrative 22.

For these reasons, the Services' arguments fail, and we summarize them for you in closing demonstrative 23.

Finally, it is important to remember that serving low-willingness-to-pay consumers should not be prioritized over all else, especially because free and low-priced services can cannibalize sales of paid subscribers to the detriment of Services and Copyright Owners.

Now let's turn to the next part of Apple's proposal, the all-in rate. Apple and all of the other Services agree there should be an all-in rate. And Apple, Pandora, Spotify, and Google all agree that the rate should not have a mechanical floor.

And all-in rate is traditional. It is what the CRB did in Phono I and Phono II by adopting the proposed settlements without raising any objection that they exceeded its authority. This is as Mr. Marks' discussed. And I also note his excellent judicial estoppel argument.

An all-in rate also provides consistency for Copyright Owners as to the total value of their musical works and greater predictability for Services regarding their royalty costs, even as performance royalties might fluctuate.

First, as experts for Pandora and Google explain from an economic perspective, mechanical rights and performance rights are complements. So as the price of one goes up, the others should go down.

This prevents total costs from reaching inefficient levels. Second, as fact witnesses for Apple, Pandora, and Google all testified, the all-in

rate makes business sense because it adds predictability, which can make budgeting and planning easier.

Third, the all-in rate is consistent with the 801(b) factors, especially the second factor to afford Copyright Owners a fair return on their creative works.

Because Copyright Owners receive mechanical and performance royalties for interactive streaming services, the only way to ensure that they receive a fair return on the creative work is to factor in both types of royalties into the analysis.

If Your Honors instead set a mechanical-only rate without an all-in or a rate with a mechanical floor, that could lead to the Copyright Owners being either overcompensated or under-compensated, depending on fluctuations in performance royalties, which obviously conflict with the second objective.

Thus, for the reasons we have summarized on demonstrative 27, Apple believes an all-in rate should be adopted and the other Services agree.

JUDGE FEDER: Ms. Cendali?

MS. CENDALI: Yes, sir.

JUDGE FEDER: You noted that using an

all-in structure creates predictability for the Services. What does that do for the publishers?

Once you go to an all-in structure, the amount of mechanical royalties is going to depend, in part, on what the PROs are getting for performance royalties, which is completely out of the control of the publishers.

MS. CENDALI: That's true, Your Honor, but the key thing is under Apple's proposal, the Copyright Owners will always know they are going to get .0091. They may get more than that, depending on what the performance royalties are, but they are at least going to get .0091. And that provides protection.

JUDGE FEDER: Well, when you talk about Copyright Owners, you are talking about them -- you are lumping in the PROs?

MS. CENDALI: That's true.

JUDGE FEDER: Who are not here.

MS. CENDALI: That's true. But I guess in this area, we're not talking about anything different from what the existing -- we have been living with an all-in rate. It has worked for good reason.

And, frankly, Your Honor, I would turn it

around. And in light of the evidence that has come in about some of the PROs taking aggressive positions, et cetera, you know, without an all-in rate, there is a real possibility that an overly aggressive PRO could make the whole system come tumbling down.

So I think that the concern about them advocates for an all-in rate, not against it.

JUDGE FEDER: But with an all-in rate, an overly-aggressive PRO, putting aside the fact that there is a rate court to keep an eye on that, at least for two of the PROs, an overly-aggressive PRO could essentially take all of that 9.1 cents and leave nothing in the mechanicals, so the publishers get nothing, and there is no basis for recouping advances to songwriters?

MS. CENDALI: Well, again, the combination of mechanical and performance at a minimum would be .0091. And so, you know, how that is allocated between the two might vary, but it would at least be that amount.

And as Your Honor said, there is another rate court to handle part of that. But the opposite, the effect of not having an all-in, I think, could make it bad for everybody because there

would be no constraint on performance royalties.

And I think that that would be dangerous. And that's why we have had the all-in rate in existence for the past period of time. And I haven't heard in this entire proceeding that much criticism with regard to how it has been actually working to date.

JUDGE FEDER: Could that be in part because there is a mechanical floor, at least in the Subpart B rates?

MS. CENDALI: It could be, but if so, there wasn't evidence presented to that effect.

JUDGE FEDER: Well, we do have evidence that at least one of the Services here has been paying on the mechanical floor.

MS. CENDALI: That's true, but there is also a lot of evidence that that's just one service and a lot of them have not. And so which do you counter? You are the judge, not me, but I would look to more than the one in that case.

And, in any case, and to further address what you were just saying about the Copyright Owners would argue that sometimes some Services would pay nothing in mechanical royalties in certain months, but they still would receive at least this amount of

royalties.

Now, equally wrong is that Copyright Owners --

JUDGE STRICKLER: But they wouldn't because you -- it is an all-in rate. So just -- it might not be realistic, but just mathematically if you are going to subtract more than the equivalent of the .0091, you would be left with no mechanical royalties.

MS. CENDALI: Right, they may have no mechanical royalties, but they would have much more in terms of performance royalties.

JUDGE STRICKLER: But that goes back to Judge Feder's point. That would not be available to be able to fund the recoupment of advances.

MS. CENDALI: No, but let's go back to this advances point. I hadn't planned on addressing that. And that is on what stone in the statute are Copyright Owners and should everybody have to jump through gymnastics to make sure the Copyright Owners can pay advances? I don't see that anywhere in the 801(b) factors. I don't see that in any --

JUDGE FEDER: The disruption factor.

MS. CENDALI: Pardon me?

JUDGE FEDER: There is a disruption

factor.

MS. CENDALI: Yes, there is a disruption factor but, again, just like we're saying that Services can do different things in how it chooses to price tiers and to do things to -- for what makes sense in running their businesses, Copyright Owners, if their game was to give advances could pay advances off performance royalties or something else.

It doesn't have to just be on mechanical. I note that in the publishing industry that I do a lot of publishers and the book industry frequently pay advances. It is not based on any kind of metric or statutory rate or anything like that. They just look at a book and figure out, well, you know, for Clyde Kessler, I am thinking the advance should be X and for X, Y and Z, the advance -- it is not too different.

I suspect in the publishing world you could probably figure out that Taylor Swift might get a certain advance and somebody else should get another but to have us all go through gyrations just to preserve their own internal practice of giving advances, I don't think is supported by the evidence.

In any case, moving on, I want to address the fact that the Copyright Owners also argue that the performance royalty deduction is too complex. It is not too complex. We have been doing it for the past eight years.

So let's move on for the sake of time to the third aspect of Apple's proposal. Its proposal limiting royalties to non-fraudulent streams, 30 seconds or longer.

And Google, Pandora, and Spotify all have joined Apple in proposing this element because it is economically sensible and makes sense, if you were to describe it to your kid.

As witnesses for Apple and Spotify testified, short plays come from consumers accidentally pressing play, scrolling playlists, or sampling new music. They may not even -- they don't reflect actual consumer demand.

In fact, they are more likely to show the opposite. Ahh, this song is terrible, let me skip it. The idea that the Copyright Owners would want the same payment in that kind of skipped short plays just doesn't make sense, nor should there be payment for fraudulent plays generated by bots and people being paid to listen to the same song 50, 100 times,

et cetera, over.

And including such plays in a per-play rate as the Copyright Owners propose or rather not eliminating them, as we suggest, would lead to a substantial windfall for Copyright Owners, rather than a fair income as required by the second 801(b) objective.

JUDGE STRICKLER: I have a question for you with regard to this 30-second issue. I understand the point about accidental plays, certainly about bots.

But with regard to somebody pressing a button and listening to a song going, oh, this song is terrible, that's experiencing music. And I thought it was the Services, one or more of the Services' position was that one of the major selling points of streaming services is that you get to sample music. I think Spotify in particular makes that point.

So I can listen to a song for 15 seconds and go: God, this is awful, only my kids would like this song, or I can -- but do I have to sit there and listen to the whole two and a half minutes of the song and I say this is not getting any better at all? But I have experienced it and so why shouldn't

the Copyright Owners be paid for my miserable 25-second experience?

MS. CENDALI: Because your miserable experience is certainly not the whole song. It is just -- it is just enough to say I actually don't want to experience this song. I don't want to hear this song.

And the contrary rule would, by making people have to pay no matter how little a song is played would lead to all these wonderful -- you heard Mr. Dorn talk about this from Apple -- all these wonderful consumer engagement and discovery tools being thrown out the window because why would you want to encourage people to try new music and look at new things?

And from the Services point of view as long as they listen to something, maybe it doesn't matter, right, but it is a good thing to try to make music available to the world. Why would you be spending money in millions of dollars and having electronic advice, individual curated advice, all the things you heard the different services offer if the reward for that is you are going to have to pay for you looking at something saying this is better for my kids. I don't like headbanger music, skip,

it doesn't -- it doesn't make sense.

Rather, if somebody is actually listening to the song, then they should be paid. If they are not listening to the song, they shouldn't be paid.

JUDGE FEDER: Ms. Cendali, when I go to the local ice cream store, they will give me a sample of a particular flavor to see if I like it or not.

MS. CENDALI: I like that practice.

JUDGE FEDER: Yeah. I don't have to pay for that but they have to pay for that ice cream. I mean, isn't that kind of an inevitable result of a per unit structure?

MS. CENDALI: Well, I guess, Your Honor, the store could decide in Ben & Jerry's may be deciding it is worth it for them to give you the free ice cream without making you pay for it, but you could easily say, let's say you are Ben & Jerry's and you are offering not just Ben & Jerry's but Carvel and several other different kinds of ice cream, it may be that it would be better to get people to experience those different choices and that different type of ice cream to not have to be paid for those free samples.

Certainly I go to the supermarket and

there are plenty of people out there offering flee samples at Chicos or other expensive stores, and they are happily being supplied free by the company to try to get you to like them. So it is a question of which model --

JUDGE FEDER: That's another business model, but the difference, obviously, with the Chicos is there is no government entity saying that the suppliers have to provide it free.

MS. CENDALI: And you are absolutely right. But the question is, it goes back to the fundamental purpose. Apple does do -- does believe that there is an inherent value of music and does believe that a Copyright Owner should be paid when a song is played a fixed sum that it can count on and that the Services can count on.

JUDGE STRICKLER: But only for 31 seconds or more?

MS. CENDALI: That's right. Because that's really not playing in our mind the song. There is also additional support for this point of view in your restricted information, in your handout at demonstrative 30 with regard to industry practice in this regard. We have not just made this up out of whole cloth.

Now, we have discussed Apple's proposed rate structure. Next let's talk about the specific per-play rate Apple proposes. As Mr. Dorn explained, Apple came up with its rate by multiplying the Subpart A download rate by a one download equals 100 streams ratio.

Starting with the Subpart A rate is consistent with the widely recognized economic reality that interactive streams and downloads are substitutes. As shown in this chart from Dr. Ramaprasad's expert report, as interactive streaming has increased, downloads have decreased.

In addition to the material presented by Mr. Steinthal in slide 18 of his presentation, several Copyright Owner witnesses have testified, corroborating this trend, as you can see in demonstrative 34. And several Service experts have also agreed that interactive streams and downloads are comparable as shown in Exhibit 35.

Given this relationship, it makes sense for the download rate to be the benchmark for the interactive streaming rate. Moreover, the CRB set the download rate in Phono I after applying the 801(b) objectives, so it implicitly satisfies these factors.

So the next step in Apple's benchmarking analysis was to set the conversion rate using the benchmark. As Dr. Ramaprasad testified, a 1-to-100 conversion ratio is reasonable because it falls within the range of ratios as shown here in demonstrative 36 upon which the industry itself has relied in a non-made-for-litigation context.

The 1-to-100 ratio, in fact, is a conservative figure that favors the Copyright Owners in this time of transition. As Your Honors can see by reading the exhibits listed here in demonstrative 37, these are not restricted, and all of which were admitted for the truth of the matter presented, these ratios were prepared with music industry input, including by the RIAA itself, which represents labels, after extensive research and analysis and with no sign that they were prepared with a litigation slant or bias.

The Copyright Owners presented no evidence to the contrary. In fact, there is ample evidence that publishers and songwriters accepted these conversion rates. Just one example is the Sony/ATV web site touting its artists' success on the Billboard 200 chart, which uses the 1-to-150 ratio.

Exhibits 1595, 1596, and others are to the same, 1594. Significantly, Mr. Israelite also testified that the NMPA itself chose to use the 1-to-150 conversion ratio in giving out songwriter awards. And this colloquy where Mr. Israelite was questioned by Judge Strickler, we think is very illuminating.

So with nothing else to point to, the Copyright Owners, you know, grasp on an article marked as Exhibit 1497 that they say undermines somehow the Billboard 1-to-150 ratio. It doesn't even mention the ratio and it came up before the ratio was even announced. And it wasn't admitted for the truth of the matter in any case.

JUDGE STRICKLER: I am going to ask you a question going back a little bit in your Subpart A conversion and it relates again to the 30-second stream that maybe we have been harping on too much, but let's play that harp.

Is there anything in the record, all of us may have some experience, but my question is really with regard to the record, as to for the purchase of digital downloads, as to whether or not the retail store from which you, you know, metaphysical store from which you buy the download,

whether it is Apple iTunes or any other store allows you to sample the music for a period of time, short period, 30 seconds, 45 seconds, 15, what have you, without having to pay for the music to decide whether you want it?

As I say, to reemphasize in my question, we may all have some experience personally, but that's not my question. My question really is is there anything in the record that talks about that ability to access snippets of a song before you buy them?

MS. CENDALI: I am not aware of anything, being very precise here based on what I know as Dale and what I know in the record. And I am not aware of anything in the record that addresses sampling of downloads on iTunes or other Services.

JUDGE STRICKLER: If there was something in the record in that regard, that would suggest a parallel between Subparts A and Subparts -- and your proposal in Subpart B of no payment for plays of less than 30 seconds?

MS. CENDALI: Well, there is always a parallel to anything. We are all lawyers. We make analogies to everything but you would have to consider it in the -- in whatever context that it

is.

And I really -- I don't want to say more because I don't think it is appropriate to add new things to the record that aren't in the record.

JUDGE STRICKLER: It only applies if it is in the record. If nobody can point to it, I don't think it is an official notice type of situation. So that's just the way it is going to have to be.

MS. CENDALI: But, in any case, going back to the conversion ratio, it can't be under-emphasized -- maybe I will overemphasize -- it can't be under-emphasized that Apple's proposed ratio is also corroborated by academic research conducted by the Copyright Owners' own expert, Dr. Waldfogel and his colleague, Dr. Aguiar.

Based on reviewing extensive data from 2013 through 2015, which included information on over 1,000 songs, they concluded that their best estimate was that 137 streams displaces one track sale.

JUDGE STRICKLER: In the evidence that we saw on that, didn't we also see within that article there was a 43-to-1 ratio that related to specific, substitution of specific tracks for different tracks

and if I am -- I know the 43-to-1 is right if I am describing what it was correctly, how do you respond to the argument that that undermines or at least calls into substantial question the legitimacy of the 137-to-1?

MS. CENDALI: Well, you read my mind, because the next words out of my mouth is the Copyright Owners say this article also supports a 1-to-43 ratio. But that is the plain language, just read the article shows was a different analysis based on very limited data that was mainly consisted from 20 foreign countries for a much shorter time period. I think it was just nine months in 2013.

That did not alter, and this is the key thing, they could put bows and ribbons and spotlights on this 1-to-43 as much as they wish, but the bottom line is that the article concluded clearly and convincingly and repeatedly that the best estimate in light of everything, including looking at the foreign countries for that period of time was that the 1-to-137 ratio was the best ratio.

JUDGE STRICKLER: Refresh my recollection. Was the 1-to-137 based on U.S. data as opposed to global data?

MS. CENDALI: There was a little bit of

-- my recollection was there was a little bit of Canadian data. There was a little bit of data in it. And I think Dr. Ramaprasad testified to this, but that the 1-to-137 was much more U.S.-based, while the 1-to-143 --

JUDGE STRICKLER: You mean the 1-to-43?

MS. CENDALI: Excuse me, the 1-to-43 was clearly 20 foreign countries, much shorter period of time, 2013 as opposed to two-year period, largely U.S. And the bottom line is what did the experts conclude?

What they concluded, again, you can make all the arguments you want, but the paper had a clear conclusion. And the conclusion was that the 137-to-1 ratio was appropriate.

And you know what? If Dr. Waldfogel disagreed with Apple's interpretation of his paper, he could have come in, he could have sat in that chair, and he could have said: No, that was wrong, it really is the 1-to-43. But the Copyright Owners, even though they retained him so we couldn't, did not call him.

Now, grasping at straws, the Copyright Owners claim that Apple's proposal is unreliable because it is a round number. There is nothing

inherently wrong with round numbers. That's the number that the industry uses, including the NMPA.

Plus that range is corroborated by the 1-to-137 ratio, which is not a round number, if that matters. Ultimately, the Copyright Owners cannot deny that widely accepted industry standards support Apple's analysis, as does academic research by their very own uncalled expert.

Now, unlike Apple's reliance on preexisting, unbiased industry analyses, the Copyright Owners strain to come up with a methodology, a sui generis methodology that supports increased rates. That analysis, all their analyses have no basis at anything in the actual business world.

For example, Dr. Eisenach based his made-for-litigation benchmarking analysis on sound recording royalties that have no connection with real life. First, sound recordings are not comparable to musical works, especially because the value of a sound recording can vary dramatically based on the singer, like me versus Adele.

Second, the relative value between the two is not stable, even under his own analysis. Third, the CR B has rejected prior attempts to

equate royalties for sound recordings and musical works as reflected on demo 42 talking about Web I, Web II, and SDARS I.

And, fourth, Dr. Eisenach excluded relevant data. Dr. Rysman's analysis fares no better. He supposedly analyzes historic data and then calculated the various proposal's impact on royalties. But as summarized in demo 43, like Dr. Eisenach, he excluded many streams, which skewed his results in favor of where the Copyright Owners wanted to come out.

Finally, Dr. Gans' analysis is similarly flawed. First, he claimed to use a Shapley value analysis to recreate the free market, but as discussed that the free market isn't the standard here. It is 801(b).

Moreover, Shapley is based on the idea, the whole premise of Shapley is based on the idea of people playing a game in a cooperative setting. It is the cooperative game theory.

But in SDARS I, at 4092, the CRB criticized an expert's use of a Shapley analysis and said non-cooperative or a non-cooperative approach may have been more appropriate because the industry players will act to maximize their own benefit.

And the same is true here. It is clearly a competitive non-cooperative industry with different people having different points of view.

Second, Dr. Gans admittedly did not conduct a true Shapley value analysis, calling it Shapley light, whatever that means. Third, he made unsupported assumptions, including that any increase in musical work royalties would be attributable to an increase in mechanical royalties only or assuming in the free market that label and publisher profits would be equal.

And, fourth, his analysis of historic rates was biased upward. The Copyright Owners cherry-picked data to yield one result, a dramatic increase in royalties without any evidence that such an increase is fair or necessary for the industry.

And, in fact, the hard evidence supports Apple's position that a dramatic increase is not appropriate, including, for example, the restricted financial data regarding publishers' and songwriters' revenue shown in demonstrative 45 that Your Honors have before you.

I would like more money too, but I need to justify it. I can't just go to the firm and say: Pay me more. I haven't tried that. But, anyway,

you can't.

Contrary to Drs. Rysman and Gans alleged historic analysis, the real data shows that the Copyright Owners' proposal would be highly disruptive as shown by the restricted information in demonstrative 46 in Your Honors handouts. That shows it is just too high, a principle that we agree with in terms of the other Services.

JUDGE STRICKLER: You mention in this slide 46 the multiple by which the Copyright Owners' proposed per-play rate is compared to the 2015 average, right?

MS. CENDALI: Correct.

JUDGE STRICKLER: What does Apple -- can you say in open court, tell me if you think there is a problem, what Apple's proposed per-play rate is compared to the 2015 average in terms of multiple? Estimate if you don't know it.

MS. CENDALI: My -- I know that our overall number is a midpoint among what all the different Services pay. I don't remember the exact number right this ten seconds as to how it is.

JUDGE STRICKLER: Is it more than 100 percent, do you recall?

MS. CENDALI: It's -- we are much -- we

are lower than what the Copyright Owners is proposing.

JUDGE STRICKLER: Well, that's 300 percent. That's why I said 100 percent.

MS. CENDALI: I don't have that. That's not something I can say in open court for one thing. And I don't have that number at my fingertips.

JUDGE STRICKLER: Whatever it is, I am assuming you are saying it is not disruptive?

MS. CENDALI: Right. As Mr. Dorn testified, our number at our rate is historically supportive and would not be disruptive.

JUDGE STRICKLER: Thank you.

MS. CENDALI: Now, one additional flaw with the Copyright Owners' proposal is it applies the same interactive streaming rate to music lockers. As Your Honors heard from many witnesses like Mr. Dorn, Ramaprasad, and even Mirchandani for Amazon, the Copyright Owners are double-dipping, seeking payment at the time of the download and again every time that purchased song is streamed.

This isn't fair and would discourage companies from offering lockers and would harm the download market.

Okay. Having addressed the key evidence

in this proceeding, it is now time to bring it home and return to where we started with the 801(b) factors. The Copyright Owners argue for a one-sided rate and for a one-sided interpretation of the 801(b) factors, particularly in their conclusions of law.

Regarding the first factor, they want Your Honors to believe that the only thing that matters is incentivizing people to write music, but incentivizing Services to make substantial investment in technology and infrastructure that also help make music available to the public, and that should be considered, and CRB precedent supports this conclusion as reflected on Apple closing demonstrative 48.

Moreover, as a factual matter, as summarized in demonstrative 49, Apple's proposal satisfies factor 1 because it incentivizes, A, Copyright Owners with consistent returns and, B, Services with upside rewards. It also builds trust between songwriters and Services as it is transparent and easy to understand creating buy-in to the system.

For factor 2, the Copyright Owners again attempt an unequal interpretation by inserting the

words "opportunity for" before "fair income" in their conclusions of law. But the actual test requires fair income, not just an opportunity for one.

Apple's proposal provides a fair return to Copyright Owners as it is based on the existing download rate that all agree is fair. And it provides Services a fair return in light of historic per-play payments and historic data regarding profitability.

By contrast, if the royalty for the same work varies across business models or time periods, that's not guaranteeing a fair return for either Copyright Owners or Services.

Regarding the third factor, the Copyright Owners suggest in their conclusions of law that their creative contributions are all that matters. But the Copyright Owners had never built a streaming service, certainly not anything like the Services at great effort built by the different participants in this room and at great risk.

The statute, though, expressly takes this into account and considers technological contribution costs and risks as well, and that risk is disproportionally borne by the Services and

should not get short shrift by constantly talking about creating music, creating music. How about a way to listen to that music that consumers will hear?

Apple's proposal reflects these relative risks and contributions as it protects Copyright Owners from downside risk; rewards services for their risky innovations; and links royalties directly to demand.

Finally, the fourth objective considers disruption to the industry. The Copyright Owners, one, as I have mentioned, massively disruptive, exorbitant rates, the inclusion of eliminating the all-in rate, adding a per-user rate, all these different things without any evidence that any sort of rate increase is necessary.

By contrast, as you have already heard, Apple's proposal would not be disruptive. It is easy to implement. The data is already collected. It is consistent with other historic per-unit rate structures blessed by the CRB. It is compatible with a variety of business models, including ad-supported services and is supported by historic data regarding effective per-play rates.

In sum, Apple's proposal will provide

consistency and clarity for both Services and Copyright Owners without disruption for either side. And as I said on opening day, Apple's proposal is fair, simple, and transparent. These are values that Apple brought to the download market over 14 years ago and that are consistent with the factors that govern this proceeding.

As Mr. Dorn has testified, the time is now to bring the same level of simplicity and transparency to the interactive streaming industry.

For these reasons, with great respect, Apple requests that this Board adopt its proposal. Thank you.

JUDGE BARNETT: Thank you, Ms. Cendali. We will take five minutes.

MR. SEMEL: I don't want to stop you from getting any refreshment. Short would be great, if we want 10 or 15.

JUDGE BARNETT: Five minutes is all we need. Thank you.

MR. SEMEL: Okay.

(A recess was taken at 2:53 p.m., after which the hearing resumed at 3:02 p.m.)

JUDGE BARNETT: Good afternoon. Please be seated. Please feel free to take off your

jackets. It is quite warm in here.

MR. SEMEL: We are going to hand out demonstratives.

JUDGE BARNETT: Mr. Semel, again, I will repeat, we are at your disposal. We can stay as long as you can.

MR. SEMEL: I will move quickly.

MR. ZAKARIN: We shipped him here. He will be here for weeks now.

MR. SEMEL: I will be done by 9:00.

JUDGE STRICKLER: p.m.?

MR. SEMEL: Yes.

CLOSING ARGUMENT ON BEHALF OF COPYRIGHT OWNERS

MR. SEMEL: I feel like it is the Lord of the Rings and I'm the sixth ending and we're all ready to go home, but I will do my best to make you happy you stayed.

I am also a little torn between responding to the main points raised in the last three and a half hours of closing arguments and following on with an outline that we have. I am going to start with the outline, but I would ask Your Honors, I know you don't need my permission, please interrupt if there is any topics you want to hear.

This is tea-leaf reading about what we think you want to know. At least with me, you know, you are asking the right person, or hopefully the right person, any questions you have about any topics, so please feel free to stop me and tell me what you want to talk about.

JUDGE STRICKLER: What a novel idea.

MR. SEMEL: I would be happy to throw my outline out, if we wanted to make this about things you want to talk about.

Interestingly, the discovery in this proceedings began a year ago Tuesday, so we have been litigating this almost a year. I don't think one should say that this is a simple case, but I would say that the Copyright Owners have endeavored, and I think succeeded, in providing Your Honors with evidence, precedent, and sound economic principles that proves the reasonableness of their rate proposal, including empirical evidence underlying the marketplace benchmarking analysis and the corroborating Shapley analysis that four of the Services agree is ideal for this proceeding.

In contrast, I think what the record shows and what you have even heard today is that the Services have presented negotiation positions with

Your Honors. They have presented proposals that are significantly below what they themselves admit they want. They want the status quo. That's not what their proposals are.

And I think that their proposals are often even outside of what their own experts determine is reasonable. I think in the idea that if they start low, when the baby gets split, they will be holding more of it.

But I want you to know that the Copyright Owners have endeavored to present a proposal that has reasonableness baked into it, that is far below the ask that the Copyright Owners could have made in this proceeding, far below what their own experts think is fair and reasonable.

I think Dr. Gans was asked in his cross-examination: Do you think this proposal is fair? And he actually said: Well, the person who would have the fairness problem with the Copyright Owners' proposal is the Copyright Owners. Because it is actually still far below what his analysis found would be fair, as well with Dr. Watt.

And so we have endeavored to provide a proposal that doesn't need to be split, that in itself is I am not going to say easy for Your Honors

to sift through the 13,000 pages and 1500 exhibits, but that provides all of the ingredients that you need to get to a reasonable rate.

And we have looked at this as a two-part case. And we spent so much time on the slide in the opening that I had to repurpose it for the closing.

The first part is a rate structure segment. And by this not just the types of rates per-play, per-user, revenue, but the definitions, the calculations, the scope that underlies that structure.

Interestingly, you heard three and a half hours of argument, you heard virtually nothing about the definitions behind the terms and how the rate structure works in most of the Services' proposals.

The second part of the analysis is the rate value. And that's simply the values that fit within the structure that has already been identified. And Apple talked a bit at length about usage-based royalties being the preferred type of royalties by rate proceedings. And we will discuss a little bit of that later.

We agree. And in this case we have a disagreement, though, that there are two types of usage at issue here. And it is what differentiates

this case from the prior proceedings involving performance-only and non-interactive spaces because here you have an access to value as well that you don't have in non-interactive spaces, which is the crux of the difference and really provides the additional value over non-interactive spaces.

So that leads to our per-user rate prong. The Services interestingly alternately deny and embrace the access value that the per-user rate prong captures. I find it interesting that they deny it. The per-user rate prong is the most Universal rate prong in this space, without question.

That is the rate prong that you see everywhere, the binding rate prong generally that you see everywhere. And it is for an obvious reason. The access to all of the music in the world, the access to large catalogues, that is what people want. That's what they pay for.

They don't get refunded if they don't stream. They pay for access. And the access is what allows you to get rid of your collection, right? The access, that's what substitutes for the ownership more than anything. It is a critical value. And to ignore it, to treat this like a

non-interactive space, we feel, again, it does not provide a fair return for the licensed rights here.

And you see Apple, I think in their presentation, showed in a sense the response to our response to this statement by Dr. Ghose. And here he is describing exactly what we're talking about.

And it is the ease of access that you charge a subscription fee, the rate best reflects the value the consumer derives. He talks about the use that consumers make, even when they don't stream.

So use is not just streaming. Usage is the access as well. And that, you know, he complains that a per-play rate structure would pay them nothing in that scenario as an argument for why you need a per-user rate.

Now, the difference they make between lockers and subscriptions, difference without a distinction, really. They say you use a locker to store your music. Well, that's what a subscription service is. It is just the biggest locker in the world. It is a locker that is far bigger than your collection. And they are stored on the same servers and they are actually generally streamed off the same servers.

So if you have a locker service and you put your song on, they match it to their streaming server. When you hit play, you are getting the same stream that someone is getting who has got a subscription service. They have access to a larger locker than you, but the dynamic, the value that you are getting is the same.

And Dr. Ghose's rationale, we agree with entirely, you know, and that is something that should be compensated.

The Services, as I say, it is a bit of a love/hate relationship with the access value. When they are not denying that it exists, they are saying, oh, it exists and we should get it.

You have heard this, I think from Mr. Steinthal, as well as Ms. Cendali, that somehow the value of access is something that the Services create. And I will note the work-by-work license idea that Section 115 is a work-by-work license and that somehow then value that comes from more than one work is somehow not attributable to the Copyright Owners. And I think that misses the point.

Access value is for each work. Every work has an access value. So the value that comes

from access to a catalogue is just a combination of value that comes from access to individual works.

And you don't need to buy that download because it is the access that you get when you subscribe to the service. So I think that that's an argument that conceptually doesn't go anywhere, the idea that you are somehow precluded from recouping the value of access simply because it is a work-by-work license.

And I will also note that they are proposing revenue prongs. That is not something that is a work-by-work type of compensation as well. What you get to if you are arguing it is a work-by-work license and therefore you somehow can only capture the value of each individual work, you are talking about a per-play rate, which of course Mr. Steinthal is not advocating for, so his concept leads him to a rate that he doesn't believe in, but, moreover, it just doesn't -- there isn't any need to link the type of payment so closely to the way the Section 115 license is structured.

And, again, you see this again and again. There is a per-user rate in the current regulations. There are per-user rates in all of the deals.

There is nothing that precludes this from

working. And also I will note, forgive me for quoting Your Honors to Your Honors, but you made this point at the hearing, right? Dr. Ghose says: Well, I think access is provided by the Services. And Your Honors note quite clinically: Well, isn't access provided actually by everybody? Because you can't provide access if you don't have access. And, of course, that's exactly what's going on here.

You can't provide access to any song unless you have access to that song. And that access ultimately comes from this license to reproduce and distribute. And that is the license that the compulsory applies to.

Now, getting to the usage-based pricing, this was covered a little bit by Ms. Cendali, there is a very strong precedent, perhaps the most consistent type of holding you see in these proceedings is that compensation, statutory rates, should be linked to usage. And not linked in a vague way.

Mr. Elkin, I think at one point, noted that Amazon has been paying more than it used to. Well, maybe it has been paying more than it used to, maybe it is because it has got more market share than it used to.

The point with these is when it says payments should increase in direct proportion to usage, you need to have a linkage there to be fair. If you are going up like this (indicating) and only paying up like that (indicating) you have a decoupling.

The fact that you are paying a little more than you used to is not the point. You are not paying as much as you should because you are getting significantly more than you are paying. You are using much, much more and you are paying a little bit more.

JUDGE STRICKLER: What if the reason you are paying more in revenue but not proportionally as much as the number of plays is because you are working your way down the demand curve, as the experts have argued for the Services, that you are exploiting those low-willingness-to-pay listeners by providing them with discounts or ad-supported services and that's the reason why there is the lack of proportion?

MR. SEMEL: I think a couple of responses to that. The first one is that's a claim without any evidence in this case. There has been a lot of repeating of we're servicing low-willingness-to-pay

consumers.

And they point to a discount for college students. And, I'm sorry, college students are not a low-willingness-to-pay group. In fact, we have in the record a study that was ignored by Spotify's expert that says college students are more willing to pay.

As Dr. Gans noted, you don't see a senior citizen's discount. You don't see a discount for people 18 to 22 who aren't in college. You don't see a discount for high school students.

What you see is a discount for the people about to become the most valuable market segment in society, right, people going to go to college and people who are then going to go on to have more money to buy your phones and more money to buy your other services.

So my first response would be this repeating of the idea, if you state it enough times it becomes true that they are servicing low-willingness-to-pay consumers, there is no evidence of that in the record.

As we will see later, the family discounts, they are not family discounts. There is no --

JUDGE STRICKLER: I'm sorry, I mentioned discounts, so I appreciate you responding to that end, but what about Mr. Klein's survey, which seemed to at least according to the Services point to the existence of low -- of a heterogeneous mix of people with willingnesses to pay?

MR. SEMEL: Well, I think -- I do, think, heterogeneity, that is going to exist everywhere, right? There is no product that doesn't have a mix of different people who are willing to pay for it. And that, as I understand it, has never required a lack of usage based pricing or called for things to be compensated on a percentage rate basis.

Most everything has a difference -- every product, people will pay different amounts for it, and that doesn't mean their input prices should be fluctuating as well.

And Dr. Ghose, I think, talked at length about this. They can recapture based on various levels of price discrimination and try to make the most they can out of it, but the idea that ultimately the input price should be priced down to the level of someone who doesn't want to pay for it, I don't think that's an economic --

JUDGE STRICKLER: I think the argument

the Services make is that the upstream pricing should be somehow reflective of their meeting the heterogeneous willingness to pay because that kind of an upstream price incentivizes -- that's the word they use over and over again -- incentivizes them to be able to meet the heterogeneous demand.

So is it the Copyright Owners' position that -- let me ask you. Is it the Copyright Owners' position that that's not true, that a varying upstream price does not incentivize the services to exploit demand all the way down the curve?

MR. SEMEL: Thank you, yes. I think for one thing, I think Dr. Watt addressed this directly in response to Dr. Marx where he was saying as an economic theory point, there is nothing that says that the model, the percentage-of-revenue model leads to more efficient results. It really depends on the details you are putting in. She is not putting the details into the model.

I find it interesting that they are still putting that demand curve up as an exhibit with the dead weight loss triangle because Dr. Marx admitted at the hearing that captures the current pricing model. She admitted that that, which is -- that that demand curve with the dead weight loss triangle

is a perfect capturing of Spotify's current plans, its per-play plan and its subscription plan.

JUDGE STRICKLER: I thought -- you said per-play and subscription?

MR. SEMEL: I'm sorry.

JUDGE STRICKLER: You mean subscription and ad-supported?

MR. SEMEL: Correct, which she talked about is ultimately a per-play price basically. If you assume that advertising is a charge, it is just not a monetary charge.

JUDGE STRICKLER: She didn't go along with that necessarily. I mean, I understand that was Professor Watt's criticism for sure. So that's a charge.

But her demand curve as she, because I remember her testimony about that, she said as you go down the demand curve, you reduce the dead weight loss triangle, but you are quite correct, if I remember, if I am reading it the same way you are, there is a dead weight loss that persists. And then she testified, but you -- you tend to shrink that even more, not necessarily to zero, but you shrink that more with an ad-supported service which Professor Watt said, yeah, but that creates a

different cost, maybe greater, maybe less, maybe the same, depends on the listener's, the ill effects of advertising to the listener.

But she said you couldn't model, because I think I asked her the question, and she said you really can't model the ad-supported service in that downward demand curve because it just doesn't fit. It is a differentiated product. But it does tend to shrink dead weight loss.

Am I wrong in understanding it that way?

MR. SEMEL: I think that's right. I think that the only thing I would add to that, and this is Dr. Watt's Appendix 1, is that, you know, the kind of result of that is well, they all sort of on some level resemble this with different points on the curves, but when you plug in numbers, you get different results as to which is more efficient.

In a theory model, there is nothing about a percentage-of-revenue structure that is inherently more efficient than a per unit structure. And that I think was Dr. Watt's point.

JUDGE STRICKLER: I agree with you, and I think -- but I also saw a nuance in Dr. Watt's testimony, tell me if you disagree, that he was saying just what you said, that percentage of

revenue rates are not required to do that, but what is required, if you want to incentivize downstream, is having rates that allow for price discrimination.

And your, the Copyright Owners' proposal is not a -- would not be designed to incentivize price discrimination downstream because it is the same per unit price no matter what they come up with, which goes back to my prior question to you, which is is it the Copyright Owners' position that the Judges should not be interested in upstream pricing, the rate we set in setting a rate that incentivizes the ability of the downstream providers to exploit low-willingness-to-pay listeners?

MR. SEMEL: Yeah, I think that the way that at least I would come out with it, in the analysis that you are talking about is that there is an ultimate -- again, the theory does not lead to the conclusion that a percentage-of-revenue structure will, in fact, give them more flexibility to price that way.

I think one of Dr. Watt's points is that when you add in a per-unit charge, you are removing the percentage-of-revenue charge. And the thing he points to in Appendix 1 is you don't know which one is more.

So at the end of the day a per-unit charge may give them more ability to price discriminate than a percentage-of-revenue charge. And you just don't know the answer to that.

Again, as Apple's witnesses have testified, they are proposing a per unit charge. They don't see a problem price discriminating. They expect that they will be able to price discriminate. The rest of the world has per-unit charges and is able to either product differentiate or price discriminate.

And I think Dr. Watt's point is that the theory, the idea that a percentage-of-revenue structure gives you that is just not theoretically accurate. It could; it could not, but there is no reason to -- there is no reason that that is something that necessarily gives them more flexibility.

JUDGE STRICKLER: Well, four out of the five Services make the argument, Apple excluded as you just pointed out, that a percentage-of-revenue rate upstream incentivizes them to be able to expand the market downstream.

Is there evidence in the record that that's not the case?

MR. SEMEL: Well, I think other than Dr. Watt's Appendix 1, because it is something of a theory question, I think that that's what he is getting at there.

I would also note that Dr. Watt makes this point as well, that the flexibility argument, and we're actually going to get a little bit to what the proceedings have said about that in the past, it really boils down to your argument for a lower rate. And your question to Mr. Steinthal earlier sort of made that point. Is this structure good or is this structure good only with these percentages in it?

And the answer is: Oh, no, no, only with these percentages in it. That's not saying that the percentages-of-revenue structure works. That's saying I found a percentage that might get the rate low enough that I'm happy with that.

JUDGE STRICKLER: Well, in that regard, the way you describe Mr. Steinthal's answer is consistent with Professor Watt, who said -- I think he said something to the effect that I suspect they don't really want a percentage-of-revenue rate, they want a low rate.

MR. SEMEL: Exactly, exactly. That's exactly where I was going with that.

JUDGE STRICKLER: Is the Copyright Owners' rate a lower rate?

MR. SEMEL: I think the Copyright Owners' rate is a fair rate.

JUDGE STRICKLER: My question was is it a low rate?

MR. SEMEL: I guess it depends what you mean by low. I think, yes, it is low in the sense that it is significantly below what their own experts came out with as a fair and reasonable rates. And this is what I was saying earlier.

We have tried to in like a baseball arbitration way present a rate that doesn't need to be split, that gets to that balance by itself. So I do think it is a low rate. Is it as low as they want? They want nothing. So nothing is -- they just want as low as it can be.

It is not a principled argument that they think there is some optimal rate. They are just arguing for the lowest rate they can get. And they are spreading their bets, right? You have four Services submitting joint findings with four different proposals.

And the idea being that if they spread their bets, maybe Your Honors will latch on to one

of them and give them that lower rate, but they even say: If you are going to raise my rate, no, no, no, go over to that other person's plan over there, they will shift structures to get to the lowest rate they can.

So my point is really there is no principle behind their rate structure arguments. It is just an attempt to get a low rate.

JUDGE STRICKLER: Well, taking it to the other side of the ledger, the Copyright Owners' rate -- and you may be responding to this later on and you may want to organize your answer and have me wait for that, and that's fine, but isn't an argument made, which I didn't hear in the closing arguments but I have seen during the papers and we heard during the hearing is that I believe it was Dr. Eisenach's rate that he generated using the 801(b) factors happened to turn out to be -- no, it was Mr. Israelite who said that the rate that was proposed here by the Copyright Owners turns out to be the same rate in essence internally that was derived when the NMPA was trying to figure out the rate under a willing buyer/willing seller standard.

So I respect the fact that perhaps or that perhaps the Services want the lowest rate they

can possibly get. Sounds surprise, surprise, that licensors want the highest rate that they could possibly get, and it happens to dovetail with the willing buyer/willing seller rate.

MR. SEMEL: Well, look, I think it is obviously fair to ascribe motives to each party that they are trying to get the best rate that they can, but I do believe we have shown our work in this proceeding.

And that Dr. Eisenach's marketplace benchmarking shows it is working. And the Copyright Owners' rate is not near the height of that. So his willing buyer/willing seller, Dr. Gans's Shapley, Dr. Watt, they point to higher rates than the Copyright Owners are proposing in this case.

And I think that was a conscious effort to make Your Honors life a bit easier. And I will say, you know, maybe we're going off on a tangent here, but I do think --

JUDGE STRICKLER: I said you wanted the questions.

MR. SEMEL: No, no, this is actually much preferable to looking at slides.

I do think some of this comes from history in the proceedings. You know, in reading

over the prior determinations, I looked at SDARS II and read it over a few times. And you see in SDARS II a comment was made, I think it was almost like dicta, but it was -- they didn't get good evidence, Your Honors didn't get good evidence or you didn't get good benchmarks.

You could feel the frustration of the Panel that there just wasn't good evidence to work with. And there was a comment made that you are going to use the parties' proposals as a guidepost.

And, you know, that you wouldn't propose this if it wasn't reasonable. And you can almost see right there -- and I am not saying that's where it started -- but you can see right there where you start getting people proposing things that are below what their own experts say because this idea that, well, if the Panel is going to take what I propose as potentially a guidepost, then I am just going to propose something that's going to move the bid, again, a negotiation tactic. I think that type of work maybe sets it up to be more of a negotiation. I will say that's not the approach the Copyright Owners have taken in this case.

I think if that were the case you would see the Copyright Owners proposing, as has been done

in the past, the one-to-one ratio, right? Dr. Eisenach has a range, one-to-one, 4.76-to-1. It would not be -- and you have sat on many of these proceedings -- not be not in keeping for us to come in and say one-to-one, right?

That's what happens all the time, but the Copyright Owners didn't do that because they were trying to make this an easier process. And I do think that we're showing our work.

You can see -- you can see the numbers there. I do believe that it is not -- the attempt here was made. You could say it is for selfish reasons, right, that's what baseball arbitrations are about, right? You are trying to say, well, if I give you a more reasonable rate you are more likely to go with my rate, so I am not saying there isn't a selfish reason for providing a more reasonable rate, but I do believe that the Copyright Owners did not put forth a negotiation tactic, which I do believe is what happened with the Services rates.

JUDGE STRICKLER: I understand your argument.

MR. SEMEL: Okay. So, again, this is a quote that is similar to what Ms. Cendali talked about, and I don't know that we need to go to this,

but usage-based metrics really are what the rate proceedings have found to be what gets you fairness.

Particularly when you are setting a rate for five years, you don't know what is going to happen.

You are giving people a lot of time to learn how to game the structure. But a usage-based metric is the best thing you are going to do. And, again, you only use a revenue-based metric as a proxy.

JUDGE STRICKLER: You just used the word that the question I was about to ask you, you used the word "only." And my question was do you understand the highlighted language to say that the only time -- your word only time -- that you can use a percentage-of-revenue metric is when a usage-based metric is not readily calculable or do you understand this language to mean that when a user -- usage-based metric is not readily calculable, then you have to go? That's not the only time you go to a percentage-of-revenue?

MR. SEMEL: I would say that Your Honor's discretion is extremely broad. So when you get into questions of could you utilize a revenue-based metric in one way or another, do I think the law

prevents you from doing something, I do think the determinations say the right way to go is with usage-based metrics but, you know, I think there is reasons for that.

And that's because it ties you to usage as it changes over time. And it prevents the gaming that goes on.

JUDGE STRICKLER: So this language that is highlighted doesn't -- from your understanding, doesn't prevent us, despite the fact that there is a Hughes image-based metric that is calculable, the Judges can still decide to go on a percentage basis or some other basis? This language doesn't prevent it?

MR. SEMEL: I think if it is reasonable. And I think reasonableness is the ultimate standard.

JUDGE STRICKLER: Sure.

MR. SEMEL: And earlier there was a discussion about the bargaining room theory, and I was going to get to this, but we are close to it now. There was a statement made that that was rejected. That is absolutely not the case.

And in our reply to the joint findings at 248, you will see we have -- we lay out the law on this. What happened was an argument was made that

the bargaining room theory was mandated and the Court said: No, no, it is not mandated. Congress left it to Your Honors to determine under the factors.

So I think ultimately you have a reason, as you have noted, you have a reasonableness range. When you fall within that range, that's your discretion. So you had made a comment like that the bargaining room theory is maybe setting the rate too high to allow bargaining. And the only tweak I would make to that is I don't --

JUDGE STRICKLER: Too low to allow bargaining?

MR. SEMEL: Too low to allow bargaining or too high in order to allow for bargaining. I think the tweak I would suggest to that is, as I understand the bargaining room theory, it is not setting it too high. It is setting at the high end of the reasonable range.

But as long as you are within the reasonable range, you are not, as far as your discretion goes, too anything, right? Your discretion from the bottom of the range to the top of the range is not going to be reversed for being too much one way or another.

JUDGE STRICKLER: As long as it is within what we determine to be within the zone of reasonableness?

MR. SEMEL: Correct. So to me the bargaining room theory is not saying you should set a rate outside the range, but saying you should set a rate within the range, so not too high, but towards the high end of the range to allow for the back and forth.

And actually I think the bargaining room theory is quite well supported. It is not a mandate, but I believe when you look at the history, it is almost encouraged because it does allow for this back and forth but, again, within the reasonable range.

Nobody is asking Your Honors to set a rate that is unreasonable, but that within that range, setting it at the high end, allows for this dynamic that as you noted even in Web IV, Your Honors, bakes in so much good stuff, right?

You get so much good things that are baked into a negotiation allowing that within the reasonable range would be good. Yeah.

So, you know, there was a lot of discussion about flexibility. Again, I find it -- I

find it interesting that is the Services are making this argument because it is literally the exact same argument that was made and rejected.

The idea that you have this pricing flexibility, and this gets to what Your Honor was saying earlier about price discrimination, this is maybe another take on that, which is I think the Court was saying -- and this would be a response to say even if you found that a percentage-of-revenue structure perhaps had benefits for price discrimination, although I don't know that it does, you have a fairness problem that really outweighs that, right?

And, you know, pricing flexibility is not in the objectives, right? Pricing, total surplus, economic efficiency is not part of the policy objectives, but fairness is.

And they have sort of come up with this circular reasoning, right? You start with we need flexibility, pricing flexibility. And then they all admit, oh, wait, we have measurement problems with revenue prongs, but we have these minima, we have these minima and that's going to solve the problem. And then you say: Wait -- Your Honors did this during the hearing -- why didn't you use the minima,

right? If the minima is doing the work, get rid of the percentage structure. And they say: Oh, no, but we want to minimize the minima.

So how do you do that? Well, we will lower the minima, but then the minima don't work any more, right? And then you have this fairness problem.

And they are setting up this sort of circular dynamic, okay, we have this tension between fairness and flexibility, but there is no tension.

Flexibility is not on the table. That's not an objective. Fairness is the objective. So it is like a false tension they have set up between something that matters to this proceeding and something that doesn't matter to the proceeding. And that's I feel exactly what this is saying.

Pricing flexibility, that's their issue. That's how they sort it out, but what matters in this proceeding is fairness. And it is not fair, and citing, again, 801(b), to fail to properly value the rights by coupling them with usage.

So moving right along, so I just want to say a couple things about Apple's proposed rate structure. Obviously there is an agreement on the fact that a per-play prong is valuable. And we

already talked briefly about our disagreement on the per-user prong.

The all-in structure, I have to say that there was a discussion earlier about whether Your Honors have the authority to sit an all-in rate. I think it is questionable. I think it certainly should be referred, if it was, but I also think I can't see how we even get there.

The idea that it is appropriate to set a rate -- and let's be clear what this is -- this is an effect to neutralize what the Southern District of New York did, right? This is an attempt to neutralize what another rate-setting body does. So this would be setting a rate that changes to offset what another rate-setting body is doing under a reasonableness standard.

And this is from Apple's post-trial briefing, and this really what they are saying, they are saying short of setting the total royalty for musical works, which is not what is within your authority, setting an all-in royalty with a deduction without a minimum provides the greatest, again, flexibility for the mechanical royalty to adjust in response to changes in performance royalties.

That's another way of saying to undo whatever the rate courts are doing. And why would -- there is -- no basis has been given for that. In a future rate court proceeding, this rate would presumably be presented as evidence.

JUDGE BARNETT: Or, in the alternative, to allow the rate court to undo whatever we did.

MR. SEMEL: That's right. What if the rate court set an all-in with mechanicals? Then what happens? You now have two courts offsetting what the other court is trying to do.

Your Honors meet every five years. The rate court may meet in the interim period, may get evidence that includes these rates and may make a determination. An all-in rate would be basically setting it up to try to neutralize everything that they do.

And I just don't see why, putting aside authority, why anyone would want to go there, why that's an appropriate thing to do and why it is appropriate to assume that what the rate court is doing is wrong because that's really what this is, right? This is an assumption that whatever rate courts do is wrong because it is an attempt to explicitly try to undo anything they were to do,

whether it is up or down to try to undo that.

And no one has given any explanation as to why that's -- it is jurisdictionally questionable, but why such a grab would be something that someone would want to do.

JUDGE STRICKLER: Do you dispute, leaving aside this thorny legal problem with the two different thoughts dealing with performance right and a mechanical right, do the Copyright Owners dispute that there is this perfect complementarity between the performance right and the mechanical right?

MR. SEMEL: Well, okay, perfect complementarity, I would certainly disagree with it in the sense that as Your Honors have noted, they serve different purposes within the industry, in the marketplace. Certain things come -- the publishers get benefits from mechanical that they don't get from the performance. So they are not just substitutable. They matter. And they are separate rights.

I understand that they are licensed at the same time in this context.

JUDGE STRICKLER: Well --

MR. SEMEL: -- together, correct.

JUDGE STRICKLER: You, of course, are correct, as we have noted, that from the publishers point of view, they are different because the publishers can recoup advances through the mechanical; whereas now they cannot do it through the performance right.

MR. SEMEL: Yes.

JUDGE STRICKLER: But from the perspective of the licensee from the streaming service, they need both licenses. Or otherwise they get no value from either of the licenses. So in that sense, looking at it from the, if you will, the buyer's side, there is perfect complementarity.

MR. SEMEL: I think that that's fair, yes, and along with other things as well. And with sound recording rights, there is also a complement. I think there is also lot of input that they need to put together.

And I do get that you have two different rights that are being used in the same context but they are two different rights.

JUDGE STRICKLER: So if both courts, the rate court and this Board set their respective rates without regard to the other, you run the risk of double -- of double paying for the same ability to

stream music, right?

MR. SEMEL: Right, except that the change I would make to that is no one is setting them without regard to the other. Dr. Eisenach's analysis explicitly takes out performance.

JUDGE STRICKLER: I'm sorry, I am not talking about the experts. I am talking about the courts themselves. The rate courts do not care what we do.

JUDGE BARNETT: They are not -- they are not allowed.

JUDGE STRICKLER: Because they don't care what we do, they are going to set it irrespective of what we do. And we either can set it irrespective, depending on your position on the law, we can set it based on, in part, what the rate court does or what the performance rate is, that's the all-in rate or we can ignore it, as you are proposing, and ignoring completely, but if we ignore it completely, we run the risk of double counting. And if we put it in, we run the risk of diminishing the mechanical rate to the detriment of the publishers.

MR. SEMEL: Absolutely, Your Honor. The one thing I would add is no one is advocating you ignore it. It is a part of our analysis. Nobody is

ignoring the performance right here.

The performance right, the performance royalties are being removed from the equation before we reach the proposed rate that we're at. So there is no double counting being done.

What this is saying is that in the future, any change that happens in the performance world, this Court should try to stop before it even happens; like to anticipate that anything that were to happen in the future we should undo.

JUDGE STRICKLER: So what you are saying is your rate, as I am recalling how it was created by Dr. Eisenach, accounts for the musical work -- excuse me, the performance royalty as it now exists because there was some dispute as to whether he used the correct numbers or not. He said he did and Services said he did not, but that's a separate issue as to the fact, not the fact that it was already accounted for.

MR. SEMEL: Absolutely. And, in fact, he used two different methods that are completely independent of each other that you would not expect to reach the same result, unless they were accurate and they both reached the same result.

So I do believe that there is a lot of

confidence in his results but he absolutely counted the performance royalties in the rate analysis that he did, yes.

So I want to briefly touch on the 30 second issue that was talked about before and note that, and Your Honors covered a little bit with some of your questions, there has been no evidence offered at the hearing that a 30-second play has value and a 29-second play does not have value.

Apple made a comment about children accidentally pressing plays. We have had no evidence about, A, whether children accidentally pressing play is a major issue or more, frankly, if I can get my child to sit around and press play, that has significant value, so I am not really sure why we should discount the value of letting a child play with a streaming service, which might be of more value than anything you could do with a streaming service.

JUDGE BARNETT: Just as a baby-sitter.

MR. SEMEL: That's right. There has been no evidence about this idea that this should be basically given a royalty rate of zero because that's really what is being asked for here, right?

When you define a play out of the

structure, you are not taking away the obligation to get a license for it. You are just taking away the rate. You are setting a rate of zero, but if you had been asked to set a rate of zero, you would have expected to get some evidence on it and you weren't given any evidence on what is the breakdown? How many of these are 29 seconds? They bit -- you talk about them being skips but, as you said, it is an intentional behavior.

So I think a lot more evidence would have been needed in order to establish that a royalty rate of zero is appropriate for what could be significant economic activity. And to note also, the current regs have no limit. Section 114 has no limit.

So all streams are currently counted under the regs here and there. And I think that's for a good reason, which is that Your Honors are tasked with setting rates for the activities. This is an activity. It needs a rate.

So the rate could be, if it was set at zero, then it would need a case for that. You need to set a case for zero. This is a backdoor way of cutting out or getting a zero rate without having put any evidence on for that purpose.

So we just don't think that that would be an appropriate thing to do.

And as for the fraudulent plays, I really don't even understand that. The idea is that the first 50 plays count, but the 51st play, they don't pay royalties. Why not just block the 51st play? Like I don't understand how the technological response to this is let the plays continue and just don't pay royalties on them.

If they have identified some bot, just stop it. I would also note that anyone who thinks only robots listen to the same song 51 times in a row does not have a two-year-old child.

JUDGE BARNETT: Or a teenager.

MR. SEMEL: That's right. Moving right along, another issue with Apple's plan -- and this has been redacted, your sheets don't have it redacted. I am not going to mention the names of the Services. I think you may recall having seen this evidence before.

It is a major problem that -- to have an all-in structure that leads to zero mechanical royalties.

And as you saw and sort of the difficulty Ms. Cendali had in addressing this question, just

saying that the Copyright Owners are getting money somewhere else does not deal with the fact that they are not getting the mechanical royalty and that this tribunal's job is to set a reasonable mechanical royalty. And zero, even if you are making money elsewhere, it is hard to see how that is reasonable.

And I will note this is Apple's own expert saying that it is actually absurd. She is saying it is in the context of something else, but it is one of those great of the many examples where the Services are speaking out of both sides so often that they don't even realize when they are calling their own proposals absurd.

JUDGE STRICKLER: Can you refresh my recollection, going back to the slide before, I know it is restricted, so I am not going to mention the name of the service in the third bullet point.

MR. SEMEL: Yes.

JUDGE STRICKLER: If we can go back to that one, right before that. So that service's standalone non-portable would have otherwise paid no mechanical royalties --

MR. SEMEL: Yes.

JUDGE STRICKLER: -- in nearly four years. What was the reason for that?

MR. SEMEL: And that would have been -- well, you can look at it from two ways. The reason is the rate is very, very low, and they are taking out the performance royalties.

JUDGE STRICKLER: That's so what I thought it was, but I wanted to make sure. By making it an all-in rate --

MR. SEMEL: And having the rate so, so very low that it gets eliminated by performance royalties.

JUDGE STRICKLER: By so low, you are referring to Apple's proposed rate?

MR. SEMEL: Correct.

JUDGE STRICKLER: Under Apple's proposed rate, this particular unnamed service, because of the amount of the performance royalty it pays, it would have paid zero?

MR. SEMEL: Correct. And I will answer it, it is in Dr. Rysman's rebuttal testimony, Tables 1 and 2. You had asked the question about what Apple's proposal does to historical rates.

It is -- Apple's proposal forecasts at the lowest rate proposed by anybody in this proceeding, so lower than every other service.

So they have a per-unit structure, but it

is so stunningly low that it forecasts out as the biggest decrease of any. It is a 98 and 99 percent decrease for some Services, and it is an 85 percent decrease for Apple itself. So Apple would see an 85 percent decrease under its proposal.

JUDGE STRICKLER: Under Apple's proposal --

MR. SEMEL: Against its historicals from 2015.

JUDGE STRICKLER: Would it be even lower than what Spotify pays now in its ad-supported service?

MR. SEMEL: Oh, wow, that's a good question. I don't --

JUDGE STRICKLER: Thank you.

MR. SEMEL: That is a good question and I don't know the answer to that. But you would see it in Dr. Rysman's charts, you would be able to see it in Table 1 and 2. We can try to pull it up.

JUDGE STRICKLER: Okay.

MR. SEMEL: So it is a race to the bottom right there.

And I will quickly take a look at the -- we have sort of put together, we have four, now three Services that are seeking this roll forward.

Again, they are all slightly different structures.

You may remember this from the opening, we looked at the ten models, and we looked at all the different calculations under each and leading to sort of 79 calculations.

I will just note that, you know, we forecast at the opening that you were not going to get any information about this and you didn't get any information about this.

You haven't been given anything to build up how you are supposed to get to 79 different calculations, what the economic basis of them is. They just keep coming back to this idea that it was agreed to in Phono I and II. But the circularity with that argument, right, is that the argument is that these rates are fair because the Copyright Owners agreed to them, but the Copyright Owners don't agree to them. Right?

So the basis for the fairness is a marketplace basis, right? This was something that was agreed to by people. But we have definitive evidence here that the Copyright Owners do not agree to these rates, so by the same logic that they may have been considered proper agreements back then, they are not agreements now.

There is no independent fairness analysis that has been done other than to say Copyright Owners want these, but I'm here to tell you, and you know this, Copyright Owners don't want these.

So the whole basis that underlies the roll forward doesn't work, simply because of the fact that we're here today and we're fighting over this.

I will also note, you know, the values as well as the structure, you never got anything. And this is a collection of values from the current rates.

JUDGE STRICKLER: And those values that you are showing us on this demonstrative are per-play rates?

MR. SEMEL: I have decapitated them. So, no, none of them are per-play rates. Some of them are percentages and some of them are unit rates, which would be pennies. But just to add a little fun to things, I thought we would see if anybody even knows what they would be matched to.

I am not even going to say which models they go with because nobody could figure that out, but even which ones are percentages and which ones are cents. I have two 18s. That is not

duplicative. There is an 18 cents and an 18 percent under the current rates. But we had a five-week hearing and you have had 13,000 pages of submissions, you are not going to see that anywhere. Nobody is discussing where those come from.

There is two 50 cents rates, but one is in the top all-in, one is in the bottom floor. You have heard about the one in the bottom. You didn't hear about the one on the top.

Again, all these rates are on 17 some percentages, some cents. This is just hammering home that Your Honors have gotten no evidence about where these values come from or how you are to write a determination that these are in a de novo level fair.

And then I will just note as much as this may seem like a lot, that's Amazon's proposal. So those are the minima that you are expected to adopt in your determination under Amazon's proposal.

Again, most of these are numbers you have never even seen in this proceeding. And that's because they got no witness testimony and they got no discussion.

JUDGE STRICKLER: These numbers that you are showing us, will we find them in your proposed

findings as well, all these various numbers and where they came from?

MR. SEMEL: No, but you will find them in their, if you wanted to dissect, their rate proposal, you would find them in there. You won't get any discussion on it.

JUDGE STRICKLER: You mean apply them?

MR. SEMEL: If you looked through and read close -- I mean, you will find this in their rate proposal. This is their rate proposal. My point is you will find it nowhere else. You will find no discussion or analysis of these numbers. Are they reasonable? Is this too high? Is this too low?

The numbers are in their proposal, but my point is just there has been no discussion of them. That's why they look so foreign to us.

JUDGE STRICKLER: So these aren't as applied, these are as stated in their proposal?

MR. SEMEL: Correct. These are the minima. If it wasn't clear, these are the minima, the percentages and the per-user minima that are in Amazon's proposal.

And the other Services are all different versions of this. Some are missing here, some are

over there but they all contain all of these prongs, values that Your Honors have not been given any evidence on.

And that's just the point I am trying to make now.

But as much as the lack of explanation of the structure and the values is bad, the thing that really I find amazing is the lack of discussion of definitions. And we talked about this.

Definitions is part of the rate structure analysis. And Your Honors multiple times talked about the need to get information, and you have talked about it. It has been so much a part of prior proceedings that particularly under revenue metrics, definitions are so important.

And yet there were 3,000 pages of post-trial briefings submitted by the Services in this case, and there was no discussion of the definitions behind their rate proposals.

Critical, not little definitions that don't matter, but critical definitions. And I am going to give you three examples. The first one is family account provisions. We heard a lot about how important family accounts are to what they are doing. What are family accounts under their

proposals?

So this is Pandora's family account provisions and Amazon's family account provisions. And here we are, the last person providing a closing on the last day, and I am the first person who has brought this up throughout this entire proceeding, whether in the written direct testimony at the hearing or in the post-trial papers.

And look how different they are? I mean the first thing we see is it is not a family plan. Let's be clear about that. There is no familial requirement. There is no requirement that you live in the same house. These are just group plans. There is no -- these are group plans and they are defined very differently, right?

Pandora seems to think the important thing is that they are paid from one form of payment. That's not a requirement under Amazon's family plan.

Amazon seems to think it is important that a person be only a part of one account at a time. Well, Pandora doesn't seem to think that is important. Nobody has discussed why these are important, which one is more important, which one is necessary.

And none of them seem to have any provisions to prevent gaming. So nothing in here that prevents users from setting -- from, you know, from maybe setting up different accounts and having different accounts connected with different plans.

And, moreover, there is nothing that prevents the Services from getting involved. So you will note that each part has two parts. The first part is the definition. And I will let you know this is the only thing that is said in each of their proposals about defining family plan. I am not giving you half of the story and there is more told. This is it.

Pandora has one sentence that defines family account, but the second part tells you what the effect is. And the effect is that they only have to pay one and a half times the individual plan, even though they have six people on the plan.

What do you not see there? They only get to charge one and a half times the individual plan. They can charge as much as they want, but they only pay royalties on one and a half times the individual plan.

And maybe they say: Oh, but if we charge more, you will get the revenue. But what does this

do? This leads us right back to the same problems we have. That's not -- we have these revenue displacement problems.

If they have a plan where you say buy six Echos and you get a family plan for six people, right, now they are getting all of that revenue and they are only paying for one and a half subscribers. And they are collecting far more than one and a half times.

So, again, there has been no discussion of these. I am not sitting here today trying to tell you what the outcome is of how these work, but to tell you that nobody is giving you any basis for how to adopt these provisions and whether they are reasonable, no economic testimony, no forecasts, no nothing.

And I find it stunning that somehow 3,000 pages were manufactured in post-trial briefing and no one thought to discuss the definitions that motivate the entire economic structure of their plans.

And it is not just family plans. What could be more central than service revenue definition. This is the heart of their entire revenue structure.

This is too small, but I just want to show you how long, that's the definition of service revenue. It is a page and a half. Nobody talked about that. Not a single witness said a single word about this definition.

And what do we see? It is not a straightforward definition. Dr. Marx testified that the proper definition is everything attributable to music. Well, that's not this definition.

And that's probably why Dr. Marx refused to opine that her own client's plan was fair. And she was murmuring about the definition when she declined to support her own client's proposal in this case.

And what do we see? This basically excises everything from revenue, except for the actual user fee and/or the sort of ad placement cost. So a click-through, which is -- could not be a more attributable to the service. This is a user who comes on into streaming and during their song they see an ad and they click it through. They don't want to share any of that revenue. That revenue is clearly attributable to the music activity.

And, again, I am not saying I can clear

up these definitions here and give you the right definition. I am saying they have failed to give you any evidence on which you could possibly approve a service revenue definition as an economically fair approach. They had how many experts? A thousand pages of expert reports.

None of them decided to look at this, break it down and say: Is this fair? Is this not fair? And probably in part because Dr. Marx, as I said, Dr. Marx doesn't think this is fair. For her the fair way to do this is to attribute all of the revenue you get, that is what you come in, all of the revenue that you get that is attributable to music gets counted. And that's not what their own definition is.

JUDGE STRICKLER: Just for clarity, this slide that you are showing us, the blue type refers -- are their proposed changes?

MR. SEMEL: Correct.

JUDGE STRICKLER: So there is a red-lined version. And the black print refers to what is now in the regulations and the red is the strikeout?

MR. SEMEL: That is correct, I'm sorry for not clarifying. For each of these, these are cuts from the red lines that they have submitted in

this case, which is a red line over the current regulations.

So, again, they are proposing changes and they are not even discussing it.

Like even if you assume, which is not a good assumption, that the current regulations have some internal basis, which is the de novo review, so they don't, they are changing the current regulations and they are not discussing what the changes are.

I don't understand how they can think that Your Honors can go through this without any testimony on this and somehow figure out yourself what they are trying to do with these definitions.

Oh, one more, just because it is too good. In Web IV, I loved this, I'm sure you remember it. You wrote it, so forgive me again for quoting you yourself but the free fourth tire, right? Obviously the free fourth tire is not free. It is 25 percent discount on everything.

Well, what is the bundle definition? The bundle definition is basically the free fourth time, right? Service revenue shall be the revenue recognized from end users for the bundle, so for all four tires, less the standalone published price for

the other components. So you buy the four tires, you subtract the price of the three tires, and what are you left with? Nothing.

So literally their bundle proposal is exactly what Your Honors found was absurd in Web IV. And nobody has testified to this.

JUDGE STRICKLER: Just to be clear, even if we don't accept their changes and we left this particular definition of -- the bundling definition the way it was, it would still have that problem?

MR. SEMEL: Absolutely.

JUDGE STRICKLER: So it is not their change that creates the problem --

MR. SEMEL: No.

JUDGE STRICKLER: This change has been there from day one?

MR. SEMEL: No. Absolutely. And in case I wasn't clear, I don't think that one can just take what is existing and roll it forward either. Even if they hadn't had any changes, these would also have to be explained.

I mean, I don't have to repeat this again. It is an experimental structure that expires.

So they do have to build this up. And,

you know, Your Honors asked the beginning are you going to build this up? And now we see it was never built up.

And so a couple quick points on Google's proposal. You know, Google, I think Mr. Steinthal noted that we complained that Google was changing its proposal after the hearing, as if changing its proposal after the hearing itself was a problem.

And it is not so much that as they are changing their proposal to something that wasn't evaluated by any expert or any witness. They had some testimony about some of the prongs, but that testimony was all in the context of their proposal, which was the 10 model, all of this.

They come out of the hearing after the rebuttals have gone in, after the testimony has gone in, and they completely reshuffle their proposal, collapse everything to one, and change their TCC prong. And they say: Oh, this is a new proposal.

It is hard to address the depth of the problems because we have no evidence or analysis. It is a post hoc proposal.

JUDGE STRICKLER: Two things about that and one in the form of the question. Under the regulations they are permitted to, right up until

the time of this filing --

MR. SEMEL: Absolutely.

JUDGE STRICKLER: -- to make the change, so there is no procedural problem with the fact that they did it. Are you saying that in their proposed findings and conclusions, the change in the rates is not explained at all?

MR. SEMEL: I think that, well, if you say -- when you say the change in the rates, I think what the change is is explained. We all know what the change is. But the economic grounding for the new proposal, no one testified to that.

You are right, you can change your proposal afterwards. And I think, A, that's appropriate. For example, what the Copyright Owners did, there was a lot of discussion about the definition of end user during the hearing. And we thought ours was pretty clear that you are not trying to capture someone who is not using it all and who hasn't paid for anything. But they thought there was.

So at the end we redefined that in an amended proposal to clarify it.

And that's something that now you are amending the proposal for something that there was

testimony about at the hearing, this specific definition. What Google is doing is changing their proposal. They didn't have an expert come on and say: This is what I think of this proposal and then amend it. They -- then we might be able to respond to it.

So all I am getting at --

JUDGE STRICKLER: So I am clear, we will go back and look at it again, obviously, but in their proposed findings which were filed, I believe, contemporaneous with their amended rate terms, there is nothing in the proposed findings that says we have changed the amended rate from X to Y in light of evidence, not necessarily new evidence, but some parts of the totality of the evidence that's already been submitted? We're not going to find that is what you are saying?

MR. SEMEL: I think what you are going to find is that the reason that they changed, the reason given, because it was given in their closing for changing it, was that Your Honors expressed a great deal of skepticism about the idea of having this Byzantine structure that we currently have, so they decided it would be a good idea to give you something simple.

So that, not a response to evidence, not to say, you know, we examined with the witnesses on the stand the idea of having -- collapsing these two one and doing all of that. There is one comment, an offhanded comment by Dr. Leonard that said that would work. And that's what --

JUDGE STRICKLER: And that's in the slides?

MR. SEMEL: That's correct. And that, as I understand it, is the sum total of the evidence in support of that proposal. But, more importantly --

JUDGE STRICKLER: So there is that, and you are saying that evidence, Dr. Leonard's testimony is meager and not sufficient?

MR. SEMEL: Yeah, I agree, yes. I guess the other point I wanted to make was that it is -- and I agree that they are allowed to change their proposal, but when I talk about the inability to address all the depth, no one has been able to analyze it. They haven't run numbers, right? There are no forecasts for this proposal.

There is no -- no one has been able to test out what this proposal would do. So that's why I say it is difficult to address it all because we weren't given an opportunity to have our experts

test out the structure.

That said, however, I do think that you can take -- there are certain things you can take away from it. One, the whole multiple rates thing is not necessary, right? We listened to it for a long -- Google saying we have to have all these ten models. Well, now we know we don't have to have all these ten models.

So all of the arguments that we were hearing about how the industry is going to collapse if we don't have ten models, it turns out is actually not so true.

JUDGE STRICKLER: From -- from Google's point of view?

MR. SEMEL: Correct. And I will note also, Google submitted joint proposed findings with the other three people, so at best what you have is four people submitting the exact same findings and reaching different conclusions about what you need.

So I am not sure what that says about the other conclusions. That said, I don't think that we need Google's admissions to see that you don't need to have ten different models for this.

But also I think you see -- so, you know, the top quote here is hammering home the point

disputed by the Services which is this whole revenue attribution and displacement issues. And this is an admission, that these are -- they probably don't need this admission, but these are issues. And these have always been issues.

Revenue attribution and displacing is a major problem. They haven't fixed it, as we just saw with the definitions and values and structure. Nothing has been done to provide that protection, but it has always been an issue.

Then in the bottom this, I think, is very important. Google is basically saying that the other TCC prong proposals don't work, right? So the other three proposed cap TCC prongs.

So what is Google admitting here? You need to remove the caps to allow the TCC prong to flexibly protect against downside risk. Or at least they think that.

So a capped TCC prong certainly does not work. And Your Honors got at this, I believe, at the hearing a couple of times, that you hit up against the cap so it is not doing you any good any more, but also an uncapped TCC prong doesn't work.

And you see this in, there was a little bit of back and forth about measurement problems and

label affiliations. And I thought it was very interesting, Your Honor asked about would there be a way to fix the label affiliation problem under the TCC prong? And Mr. Steinthal said: I'm sure we can come up with a solution for that.

Well, I am the last closing argument. So I am not sure who is coming up with a solution for that or how it is going to be presented to Your Honors in this case, but they are proposing this. This is the problem with proposing something after the hearing is over.

They don't -- we could come up with a solution for how to protect under this prong but we haven't. And I am not sure when we are going to.

And -- but as you see here also, this is making the point that equity value, increase in equity value is not compensated. It is just a fact under the way they have defined applicable consideration. But what that means is that you can't capture all of this value that the labels are getting.

I mean, the TCC prong binds you to the labels, but it doesn't -- I call them sort of side-car royalties, where you are hitching them to somebody else. But then you are not guaranteeing

that they don't unbolt you and drive off without you.

And equity is one of the ways in which that happens. It talks about what if streaming services become labels? What if labels become streaming services?

I mean, there is plenty of ventures out there in which labels are partners. How does that get worked out in this? Again, what is the answer? I'm sure we could come up with a solution for that.

But we're over. The hearing is over. We didn't come up with a solution for that is another way of saying we could come up with a solution for that.

And the side car, I blocked this out, we're going to get to it a little later, it is probably not very easy to read, so I am tell you I am going to address what is blacked out later when we're in closed. Moving right along.

But this idea that a side-car royalty rate protects is based on the idea that the labels protect their own interest and that by definition is going to protect the Copyright Owners, if they get a percentage that is defined under this applicable consideration, but the problem is applicable

consideration can't necessarily -- it is not a guarantee that all of the value will properly be translated.

And it has the same transparency problems, and it has the same enforcement problems as before. You are hitching us to the labels. You are forcing the licensors, the Copyright Owners, into a position where they don't really know. They don't know what is being accounted for and what is not. They don't know about these affiliations. And it is the same problem you get with revenue measurement.

I think I will get into the bottom of this, which is sort of a very concrete example of how the labels' interests are not the same as the Copyright Owners -- the Copyright Owners' interests in many situations.

JUDGE STRICKLER: But Dr. Eisenach's approach creates a proposed ratio --

MR. SEMEL: Correct.

JUDGE STRICKLER: -- between sound recording royalties and mechanical royalties. So doesn't he also put Copyright Owners at the mercy to some extent of whatever the sound recording labels are willing to negotiate?

MR. SEMEL: That's a great point. And I think that's a very important thing to talk about, which is that Dr. Eisenach's approach, his relative value benchmarking, is in large part based on the same concept as the TCC prong, right? It is the idea, and here you see that it tethers the musical works rate to the sound recording rate.

Now, the difference is that the TCC prong, again, it puts you in the side car and pushes you down the road. And what happens after that is that you can get unbolted from the side car.

What Dr. Eisenach does, it is the same relative value analysis, but then he translates it to a usage-based rate, which these tribunals have consistently found that's the way to make sure that for the next five years, it stays fair because we don't know what is going to happen.

JUDGE STRICKLER: So he freezes it in a per-unit fashion?

MR. SEMEL: Correct.

JUDGE STRICKLER: But part of the way he freezes it is also by extrapolating what he believes the future rates will be for purposes of setting this ratio, such as using the Pandora direct agreements and extrapolating out linearly to 2022 a

pattern?

MR. SEMEL: Well, the thing I would say about the Pandora rate, and I think this is important to say because it has been noted by a couple of Services, to say that Dr. Eisenach is extrapolating the rate out into the future is not exactly what is happening, right?

He is -- the Pandora analysis is really analysis of removing regulation, right? His analysis is basically, it is -- he is controlling for regulation that is just sort of happening over time. So it is not so much saying that future forecasts are going to lead to this rate, but that regulation would get removed in the future so it is more -- you get it.

JUDGE STRICKLER: That very point was troubling me when I was looking the other day at what he did, because he extends it out in a graph, while you can say it is not really over time, but you look at the axis, it is years. It is not degrees of regulation or degrees of deregulation. He got to a point where there was a real risk of, I guess it was withdrawal rather than fractionalization and that was causing those rates to go up in the direct licenses.

MR. SEMEL: Yes.

JUDGE STRICKLER: And then at some point then the fear of withdrawals arguably subsided and the question was how to account for that. So he was equating the risk of deregulation, if you will, with years, and there was really no reason to make that correlation, was there?

MR. SEMEL: I think you are correct. And I think he clarified it at the hearing. I do think that he clarified at the hearing what he was trying to get at with that.

And I think it was taken too much to be a forecast, some sort of financial forecast when what he was really trying to do is capture -- and we will get into this in a little bit -- this seesaw effect that you get with regulation being applied below market and not.

JUDGE STRICKLER: And it turned out to be, if you didn't do his extrapolation, a heck of a difference, if you will, because it was like 3.65 to 1 -- and I am off with the numbers here -- versus like 4.5 or 4.6 to 1, which is a big difference percentage-wise. It is like 33 percent versus like 22 percent, right?

MR. SEMEL: I think that's absolutely

right. The thing I would say about that, and I think he made this clear at the hearing, is that he didn't intend the Pandora analysis to be taken as some precise rate, but I think his words were really, what I'm saying is it is going to be less than 4.65.

He wasn't trying to say it was going to be precise, but it was really to show the interplay of the rates.

JUDGE STRICKLER: Well, he had -- he narrowed his potential benchmarks too, that he said were most probative. And that was one of them, right?

MR. SEMEL: I think that is correct.

JUDGE STRICKLER: The other is a YouTube one.

MR. SEMEL: Yes, and we will discuss. I think that is correct. We will discuss. And yes, I think that is correct.

So I do think it is important to note the similarity because the, you know, the Services attacked Dr. Eisenach's method but they embrace his method as well. The TCC prong is Dr. Eisenach's method. It is just not done in a solid economic manner.

And that gets to how Google applied its TCC prong. And this is the Subpart A benchmark.

And this is critical. It is relied on not just by Google but by other Services as well.

And what this chart is trying to show is the difference in comparability. So what Dr. Eisenach has done and what the TCC does is it comes up with a relative valuation between musical works and sound recordings because of this unique situation that they have throughout, in many places in the market, which is that they are perfectly complementary rights for a third-party service.

So you have these situations -- and this is the top part -- where it is the same -- they are both licensing the same licensee for the same use, and they are needed in the same -- in the complementary need. And so there you see the licensee is valuing them, they are being negotiated, and it does give you a very good window into the relative valuations.

And that is benchmarking, right? That complementarity is completely lost under Subpart A. Subpart A has nothing to do with that complementarity.

In Subpart A, there is no sound recording

royalty. The labels are the licensee. They are paying a fixed per-unit fee. And to use Subpart A as the settlement as a benchmark, but under Subpart A, if you talk about it as a settlement, it is the entire industry settling the entire world of Subpart A. So that's physical, downloads, everything.

They are trying to pull out one part of that and almost like pulling one part of the deal out, the digital download portion, and find out what the labels make off of that in the market and compare it with the Subpart A rate.

And it really as apples to oranges as you get. And you will -- and this was specifically stated, and I think it was 1998 PSS, the same thing was done and they said the same thing. You are comparing a fixed penny rate with the money that they go out and make in the marketplace. That's not the relative value ratio you want.

JUDGE STRICKLER: And at the outset when you began your closing, Mr. Semel, you said you were torn between responding to what they said and sticking with your outline, but you would start off at least with your outline, which I respect, but I am interested in response to a particular question because it relates to the Subpart A versus Subpart

B.

Mr. Steinthal pointed out in one of his slides what he claims to be inconsistent statements, shall we say, by the Copyright Owners with regards to whether this is substitutability between digital downloads or physical.

MR. SEMEL: Yes.

JUDGE STRICKLER: And streaming. And the words are, he claims, you should construe them as polar opposites.

MR. SEMEL: Yes. So I am glad you mentioned that. One of my colleagues told me to do that first and I forgot. There is a Post-It out there that says "do that first."

So it goes all the way back to when I was supposed to do it, it was probably slide -- could you bring up slide 4?

JUDGE STRICKLER: Your slide 4?

MR. SEMEL: He is going to bring it up, yeah, our slide 4. Sorry.

And where I was going to talk about it here was when we talk about the per-user rate prong that on-demand access substitutes for ownership.

And the Copyright Owners don't dispute this, that access substitutes for ownership in the

market. The point that they pulled this sort of out of context statement where we had said streaming and downloads don't substitute for each other. And the point in context that is trying to be made there is that -- and this is more in connection with the conversion ratio-type of analysis, which is that a download does not substitute for on-demand access from a subscription service. Almost like the reverse, that a streaming service does -- that access substitutes for ownership. You don't need your collection if you have access to the service.

But the reverse doesn't work. In other words, a download, one download, when you have, say, the 150-to-1 or the 100-to-1, one download is not the same as 100 streams of any song you want. And that's -- and so the distinction that the Copyright Owners are making there is that is apples to oranges, that one download is not the same as an X number of streams of any songs you want. And it is one of the critical problems with this whole conversion ratio analysis.

JUDGE STRICKLER: Well, let's take that as so, for purposes of the argument. So you are saying you can't make a quantity conversion because it is apples to oranges with regard to streams

versus downloads, but -- so that's an argument that could be made, and you are making it, attacking the 100-to-1, 137-to-1, what have you.

But the argument that I understood Mr. Steinthal to be making did not relate to the conversion factor of 137-to-1. He was making a revenue comparison. You are taking the 9.1 or 9.6 percent, as Dr. Marx calculated it with the higher, you know, longer songs and you find a percentage of revenue that is being received by the Copyright Owners and saying, well, if there is substitution, that revenue percentage should be essentially equal. And the Copyright Owners' position is not allowing for that to happen.

MR. SEMEL: Well, I mean, I think the problem that I have, and this gets to where we were before at 46, the problem I have, and if I miss you correct me, but with this Subpart A analogy is that it is supposed to be a benchmarking exercise. And the key to make -- what makes benchmarks work is comparability.

Just picking something that happens in the musical works world and something comparable in the sound recording world and comparing them, that's a relative valuation that doesn't tell you much.

It is really the third-party that is valuing the complementary rights and the marketplace negotiation that takes place between the rights. That's what gives you the special value in the relative value context.

Otherwise, you are not really benchmarking, you are just kind of picking two things that are happening and comparing them.

The penny rate is a fixed fee. The labels are going out and making whatever they want. Some are making a lot; and some are making a little. They pay the same amount regardless.

When they do physical, they have to pay for manufacturing. And so they are making much less. But the Subpart A settlement is for all of those uses. And Dr. Leonard is picking one use out and comparing it, but that's not -- it is just -- you don't have the negotiation. You don't have the complementarity. It is an incredibly contrived ratio that is not really a benchmarking exercise.

JUDGE STRICKLER: Well, maybe I am wrong. I thought Dr. Leonard separated out the physical versus the digital downloads and made a comparison to each of those separately against the Subpart B?

MR. SEMEL: Well, right, but the problems

is what he is trying to compare is what the labels -- Mr. Steinthal said we say they are comparing royalties on the musical works end to distribution manufacturing revenues, on the other end, right? And he says: That's not what we're doing. We're comparing royalties to royalties. But that's not really the case, right?

The labels are the licensees. What they get out of that is their manufacturing and distribution costs. And with physical, those would have to be -- if you are trying to get some sort of -- this is why I say this is where the benchmarking breaks down because you are comparing an apple and orange. He is trying to say the labels get this much and the musical works owners get this much, but manufacturing costs money. They should get back their costs for that.

And that needs to be taken out as well. And their distribution costs have to be taken out as well. So the ratio is going to be a lot closer in that scenario. And then he goes, oh, but digital is the scenario where it is almost like a royalty, right? Because in digital you are maybe giving it to iTunes and you are taking your 70 percent and it is a little bit more analogous.

But you are plucking digital out of the settlement that dealt with physical. And you can't -- this is where it all breaks down.

It is like taking one term out of the deal and valuing it without looking at anything else. The Subpart A settlement is a settlement for all of the uses. And a lot of those uses, the labels are making significantly less.

They are paying manufacturing and distribution cost and they are making a lot less. Picking one use out of that and comparing it -- and, again, also, there is this fixed fee aspect of it.

You know, they are getting a fixed fee. What the labels get out of that is, again, sort of due to their industrious and their innovation. What we say is the benefit of usage pricing. And Apple has talked about that as well.

Usage-based pricing let's people go out, if you've got a good song you get it for $1.29. If you have a bad song, you sell it for 49 cents. You still pay the 9.1 regardless of those two.

So I just think that it is really not a benchmarking analysis and --

JUDGE STRICKLER: Why do we care about the sound recording companies' or the labels' costs

when we're trying to do a comparison of royalties that are attributable, received by the Copyright Owners?

The sound recording -- maybe I am missing your point -- but the labels' costs seem to be irrelevant there. The question of what -- of 9.1 or 9.6 as a percentage of a denominator, that I understand, the song can be sold for $1.29 or $1.10 or 49 and the discount there or whatever.

MR. SEMEL: Right.

JUDGE STRICKLER: I thought -- and I will have to go back and look -- that Dr. Leonard took some sort of an average of the prices that you -- I will have to look at your papers again -- maybe you dispute the way he calculated that denominator, but it would seem to me that that's -- that the labels' costs are not relevant to that at all.

It is the amount of royalties divided by the revenues that are realized from the downstream download or physical sale, whatever that denominator, by however that might properly be calculated.

MR. SEMEL: Right. So that -- so a couple things there. One, we do certainly dispute the numbers that he got, but I think that's a

secondary point because there is a much larger problem.

I think, and correct me if I got it wrong, I think what you are modeling in that second part is more of a comparison for, in a sense, what the headline rate would be under revenue find. You are talking about the revenues that the distributor gets compared to the royalty, right? So, I mean, in that sense --

JUDGE STRICKLER: Well, compared to the retail price.

MR. SEMEL: The retail price, correct.

JUDGE STRICKLER: It is the royalty divided by the retail price. I don't think this analysis looks towards distributor versus -- versus owner.

MR. SEMEL: Right. I think that's right. And I think that's more comparable to -- remember, they are using this to figure out the TCC prong, which is kind of a relative value, not what the sound recording owners get in royalties from a third-party.

And when you look at total revenues, your -- I don't -- I want to make sure I am not missing your question. I think it really comes back on some

levels to the fact that this is a marketplace benchmarking analysis.

So what you are trying to do is you are trying to take the value that you get from the market, looking at a transaction, through all the things that it bakes into it and see the relative value. But you don't have those marketplace transactions in Subpart A. So you don't have that -- all the special things you get from benchmarking don't exist.

You have a global settlement for all uses that musical works owners are negotiating under the shadow of the compulsory in a declining market and all of the things that go into a settlement of a rate proceeding, and you are comparing that against what sound recording owners get on a single product in the free market. It is so apples to oranges to me.

JUDGE STRICKLER: If I remember correctly, the Services are making the -- I mean, more narrowly, they are looking at the Subpart A rates as existed beginning in 2012, to the upcoming rate.

If I remember correctly, Copyright Owners objected to any discovery by the Services of what

went into the settlement that -- of the rates that will now exist 2018 through 2022. So the real benchmark, or falling short of a benchmark, or weak benchmark, depending how you want to characterize it, is the old rate, which happens to be the new rate, not however you decided to do the new rate.

MR. SEMEL: I think that's probably a fair characterization. I would say, though, they don't have any information about the old rate. I mean, it is not like they put in evidence about the economic rounding behind the old rate or the new rate.

So the fact that there wasn't discovery on the new rate, it is not like they presented something on the old rate. But, more importantly, again, it is not -- the whole reason the relative valuation, right -- so what are we doing with economic benchmarking, right? I don't have to tell you this, but you are taking an unregulated market and you are sucking the beauty that you get out of marketplace value, right, when parties are negotiating, all the things that they are factoring in, cross elasticities of demand and substitutional and promotional substitutional effects and you are translating that into a regulated market to give you

the benefit of that because regulation takes that out, right?

So the relative valuation is trying to get that marketplace information and put it into the regulated market. That saves Your Honors from trying to do something without the information.

JUDGE STRICKLER: And you referring to, in your argument you just made, you are referring to the Subpart A rates in the regulated market --

MR. SEMEL: Right.

JUDGE STRICKLER: -- even though it was a consensual settlement?

MR. SEMEL: Correct. There was a great deal -- that's one part of it, yes. There is a great deal of testimony about how, first of all, this is not a marketplace transaction. So you are not getting any of -- what you are getting at best are, you know, the different dispute points and the game of guessing and the tea leaf reading of what the Judges are going to do, but you don't get all of the value.

More importantly, that is a strict benchmarking, right? In a relative value benchmarking, you are actually benchmarking two markets, right, because you are trying to compare --

like it is a two-step process, right?

You are doing the relative value and so you need to get the relative value from both ends in the free market. And then you take that relative value, you move over to your regulated market, right, and you apply your value to the unregulated part of your new market. And that outputs your fair rate in your new market.

So in the relative value situation, both sides need to be unregulated. That's what gives you your fair ratio. Then you take that ratio and you move over to your regulated market, you take your sound recording royalties, which are unregulated and, boom, it outputs. And that's what TCC is, right?

That is essentially what they are saying is take what the sound recording entities are making in this market because they are free, they can get what they want, it gives you a fair rate, and apply this value to it.

Now, they haven't explained where TCC comes from. And Dr. Eisenach has instead done an actual relative value benchmarking analysis where he looks for examples in the marketplace. Subpart A is utterly divorced from that.

JUDGE STRICKLER: You said -- you said that Dr. Leonard, to your recollection, you may well be correct, was using the Subpart A ratio for a TCC use.

MR. SEMEL: Yes.

JUDGE STRICKLER: Didn't Dr. -- correct me if you think I am wrong about this -- didn't Dr. Marx do the same analysis, two different ways.

MR. SEMEL: Yes.

JUDGE STRICKLER: One using the streaming conversion, one without, which was the same sort of approach that Dr. Leonard used but she doesn't use it for TCC. This is the part I need you to tell me if I am wrong about.

She uses it to say this -- this demonstrates that the overall rate structure that exists now is fair, including the headline rate. Isn't that her point? I am not asking you to agree with her point.

MR. SEMEL: No, no, no.

JUDGE STRICKLER: I am asking whether that's her point.

MR. SEMEL: I think that that is correct. I think that she takes the total retail price of downloads and divides the 9.1 into it and takes that

as the headline rate ratio. I believe that is correct.

But, again, I just think this is why I think sometimes, right, you become so divorced from a concept that you can't even make -- you can't even start to correlate where it is wrong.

Like this is just so far removed from what marketplace benchmarking is, that it is almost hard to correlate how wrong it is. There is no marketplace aspect of this at all. The musical works are not -- the labels -- there is no sound recording royalty. You are under the shadow of the compulsory. So --

JUDGE STRICKLER: But the argument still remains that the Copyright Owners say that streaming is substituting for digital downloads and physical sales, as a general proposition there is that kind of substitution going on in the marketplace?

MR. SEMEL: Absolutely.

JUDGE STRICKLER: How do you measure it? I mean, this you reject. I understand your rejection of it.

What in the record demonstrates that such substitution does exist?

MR. SEMEL: I think there is admission on

both sides, I believe several Service experts admitted there is substitution happening in the market.

JUDGE STRICKLER: And this doesn't capture it or belie it?

MR. SEMEL: Well, I don't -- yes, I don't --

JUDGE STRICKLER: "This" being the Subpart A comparison.

MR. SEMEL: Right, I don't think that this even tries to do that. This is not a -- this is an attempt to get a relative valuation for the TCC prong. So that's why I say --

JUDGE STRICKLER: For Dr. Leonard, for the whole nine yards?

MR. SEMEL: Yes.

JUDGE BARNETT: For the purposes of our record, there has been a lot of discussion about "this." "This" being your demonstrative slide number -- we don't have numbers on ours.

MR. SEMEL: I'm sorry, you don't have numbers. So if I give you the number it won't help.

JUDGE BARNETT: It will help the record.

MR. SEMEL: So it is 46. And it has at the top Subpart A rates are not a benchmark or

informative.

JUDGE BARNETT: Thank you.

MR. SEMEL: And I think that's right. I think Dr. Marx tries to use it to do the headline rate. Although I will note, another problem with Dr. Marx, Dr. Marx comes out with something like a 2 percent headline rate for mechanical works, but then does a Shapley analysis and comes out at 3-to-1 as the relative valuation of sound recording rights to musical works rights.

So the depth of inconsistency between her Subpart A benchmark analysis and her Shapley, which is supposed to determine the fair allocation, I think, shows how inapposite the Subpart A analysis is.

And have I answered all the questions?

JUDGE STRICKLER: Yes. Thank you.

MR. SEMEL: I do think this is very important because Subpart A is really what they are leaning on for everything. And it is not an economic benchmarking analysis.

And I don't understand, again, economic benchmarking is clear. You take an unregulated market and you take that information to the regulated market. Why are all of their experts

ignoring all of the marketplace scenarios where musical works and sound recordings are operating, and instead focusing only on this proceeding, phonorecords, right?

Subpart A is phonorecords. The current rates are phonorecords, gives them the shadow. They basically are saying let's just take what we have currently got and find some way to bake it into things going forward. The distortion from markets -- from the regulation, I'm sorry.

Okay. So now we have been talking a lot about benchmarking. So maybe we can swing through this. I do want to note, because there is a great deal of dispute in the papers about sort of marketplace benchmarking and what it means.

And I think that Mr. Marks talked about how we were claiming that you can't look at the current rates or the direct deals under it.

First of all, Dr. Eisenach includes the current rates and the direct deals under it in his benchmarking analysis. They are the high end of his range of relative values. So far from saying you can't look at them, Dr. Eisenach does look at them, and he factors them in.

So --

JUDGE STRICKLER: Which rates are you referring to now? Which ratio?

MR. SEMEL: The TCC prong and the direct deals underneath it, that basically mirror the TCC.

JUDGE STRICKLER: When you say he factors them in, he doesn't really factor them in. He considers them as benchmarks and then, just like he does on the opposite end with his one-to-one synch ratio, he says but they are not good, so I have considered them, I have weighed them, they are out.

And as we just discussed a few minutes ago, he settles on two different benchmarks that he thinks are more in the middle. And he uses those.

MR. SEMEL: I think he would say that he sets the range with the outside marks, and he finds more comparable benchmarks in the middle. But I don't know that he would say he throws out those others.

I think you are effectively correct in that he focuses on two other benchmarks, but he is very clear that his range is one-to-one to 4.76-to-1. And that 4.76 is the current rates.

JUDGE STRICKLER: He had one all the way up to 12-to-1.

MR. SEMEL: No, that's what they say.

JUDGE STRICKLER: He didn't have that in his report?

MR. SEMEL: He talks about -- so this is part of the Pandora analysis of when you remove regulation. And he talks about in the past, there was -- there were rates that were as high as that, but they have come down now.

So that's the epitome of using old data. So those are using something that has been superseded in the current market, so he doesn't include that as a benchmark, those old rates.

So I want to say that the Services have admitted, thankfully, that the place to start here is marketplace benchmarks because there is a bit of back and forth over it, but I do think it is clear from the precedent and, despite the conflict, while we may say that Your Honors can look at settlements, and Dr. Eisenach does look at settlements, the proper place to start is with marketplace benchmarks.

And then, you know, this is just noting that marketplace benchmarks are not benchmarks in the shadow. And, again, it is not to say that Your Honors can't look at things in the shadow, but, again, it is -- the marketplace is what gives you

all of the things that you want in a benchmarking analysis.

So if you had nothing else to look at, you would look at that, but the preferable benchmarks are the marketplace benchmarks.

JUDGE STRICKLER: Let me ask you a question about Dr. Marx's approach because you said that thankfully all the Services begin with a benchmark, marketplace benchmark analysis. And I was having a little difficulty --

MR. SEMEL: I would say I don't say that, but I say they agreed in an admission in the findings that you should. I don't think they do. I don't think any of them do any marketplace benchmarking at all.

JUDGE STRICKLER: Okay. Regardless of what they admit to here, because I was having a bit of a problem with it because if you read Dr. Marx's analysis, she begins, if I remember correctly, with an 801(b), which is, while it is not necessarily wrong, it is not historically -- it is not consistent with historical precedent to go about that.

And she goes to factor A and says what you want to do is maximize the surplus, and after

she basically calculates a surplus, she then plugs in a Shapley value in factors B and C. And after she comes up with those numbers, she says you see that shows what exists now under the 2012 settlement, which is now in the rates, is actually reasonable when I weigh one against the other, and if I weigh it against the Subpart A, I still find it reasonable.

So doesn't she really come at it from, I am not saying right or wrong, but from a relatively unique aspect?

MR. SEMEL: I think that is entirely correct, yes, absolutely. And I think also the way she uses different measures for different factors. So the amazing thing to me is she says her benchmark analysis is aimed at the fourth factor, and she was actually asked would you have different benchmarks if you were trying to get at the second and third factor? And she said yeah, you might.

But what does that even mean? What is the point of trying to benchmark -- you don't benchmark one factor. It is this arbitrary idea that these four factors are somehow separate and can be dealt with separately. And I think the precedent shows, you know, the four factors pull in different

directions.

There isn't -- you are just constantly getting a push and pull if you go that way. That's why I think -- and this gets at what marketplace benchmarking does -- you start with the benchmarks and then you adjust, if you need to based on the objectives.

JUDGE STRICKLER: It is not required by statute or by regulation that the Judges utilize benchmarks. We have seen in different proceedings, SDARS proceedings where someone attempts to model from the ground up. We have seen it in SDARS II where the Judges had to basically reject benchmarks to some extent and go with historical rates as adjusted.

And then there was a dispute between the majority and the dissent to that, as to how much you use benchmarks. So benchmarks are not there historical, it is consistent with what the Judges have done, but there is nothing, unless you can -- I guess I am asking you -- is it your position that we're required to begin with benchmarks and then adjust them or if we thought it was appropriate, could we go the route that Dr. Marx went, which is start off with 801(b) factors and then weigh your

result against things you think are benchmarks?

MR. SEMEL: Right, I think that, again, going back to the idea that Your Honors have broad discretion, and I think the binding issue here is reasonableness.

And I think that if it was -- I think that if it was reasonable to ignore marketplace benchmarks, if for some reason it was unreasonable to look at marketplace benchmarks, then you could go down that path, but I will note that in SDARS, which, again, in SDARS II I'm talking about here, which again I believe at least Judge Barnett you were on the Panel then, there was a very little evidence that was presented, right?

JUDGE BARNETT: First day on the job, first day of that hearing, so...

MR. SEMEL: Sorry to call back. Maybe I shouldn't be telling you what I read between the lines of what you wrote but, you know, it seems like the lack of evidence was palpable there. And that may draw you to a place where you just don't have anything to work with.

I will note on the appeal there, again, I don't think there is something wrong saying you can't look or, no, you can completely ignore or --

I'm sorry. I don't think there is anything that says you absolutely have to look at marketplace benchmarks or start there, but I do think in the appeal it made it kind of clear that, well, when you don't have marketplace benchmarks, it is reasonable to look somewhere else.

And maybe that's not saying you have to start with marketplace benchmarks but maybe it is sort of saying, look, you are bound by a reasonableness standard, and if you have marketplace benchmarks, I think you are walking close to the line of reasonableness to ignore them. And that's, I guess, where I would come out.

I don't think there is a hard and fast rule, but I do think the reasonableness factor may get you to a place where you have to really look at marketplace benchmarks, if you have them.

JUDGE STRICKLER: Look at them ab initio, not as a check against some previous approach --

MR. SEMEL: Correct, yes, that's what I mean.

And, you know, the Services make a lot of comments about the -- oh, this, I just want to say again, this is something that comes up a lot in their -- in the subtext of their arguments.

And I don't know that I have much to say about it except to point to it and note that this is not -- this is not reflected anywhere. The idea that the 801(b) standard allows below market rates by design, I don't think that that is correct. It is in their introduction. It is not cited to anything.

The standard is reasonableness. There can be adjustments that are made to benchmarks, but those adjustments have to stay within the reasonable range. And I'm not aware of any indication that the reasonable range can be set outside what the marketplace benchmarks show.

Now, if you have no marketplace benchmarks, then you are in a world where you have to work with what you have. But if you know what the marketplace range is, I don't believe you can set it below that range.

JUDGE STRICKLER: You think you can't set it below that range even through an application of the four factors in 801(b)(1)? Your argument is you still have to stay within a market rate?

MR. SEMEL: Within the reasonable range which generally --

JUDGE STRICKLER: Well, no, stop.

Reasonable range or reasonable market range?

MR. SEMEL: So I would say I think the standard -- no, I think the standard would be reasonable range. However, again, this gets back to how do you determine the reasonable range? And I think the precedent is that you look at marketplace benchmarks, if you have them for that.

JUDGE STRICKLER: Well, it raises a question that came up again and again with every economic expert, which is because the four factors include fair income and fair return. And almost to an economist who testified, when they were asked how do you as an economist decide what is fair, they started off with a disclaimer, don't ask me, I don't know, economics doesn't tell you anything about what is fair. And some of them said: But I can tell you what is a fair process.

And then there is a marketplace process, if it is fair market value, I, meaning not me, but I, the witness, says, well, I say that's -- that's a reasonable way of deciding what's fair or a Shapley value is a reasonable way of deciding what is fair.

But those are sort of, you know, that is sort of not the same thing as saying the market rate. You are using some sort of a proxy or a

stylized model, Shapley, to determine what is fair.

To the extent Shapley is intending to do what is fair, it is actually taking things out of the market. I think -- I think the experts talk -- I think it was Dr. Watt who said, yeah, the market allows for holdouts. And he said: We're going to take that -- Shapley takes that out. So it is not a market because in the market you could have essential inputs who could hold out, but in Shapley we have gotten rid of it. So your own expert says not the market, because we're going to change the market to eliminate what he called, and there was debate on this, abuse of monopoly power and not monopoly power.

MR. SEMEL: I think that's absolutely fair. And I think that Shapley is -- also, I think, first of all, it is a unique theory, right? There is a reason why it is such a big thing in economics. It is a very interesting and unique way of getting at fairness, and one of the only ways to get at it that is not marketplace.

Now, what you talked about earlier with the experts talking about, I don't know that I could tell you about fair value, but I can tell you about a fair process, but then what do they describe?

They describe a marketplace process.

So it is almost like they are ultimately saying: But the marketplace process is what gives you fair market rates.

JUDGE STRICKLER: Well, that is because they are constrained because economists don't know anything else. All they know is to say fair market value because fairness is more of an ethical concern. You don't want to ask your economist about economics and fairness because you are going into a blind alley.

MR. SEMEL: I think that's absolutely correct. And I think that's how you interpret these and this gets to the next part, which is the Services talk about this conflict between the policy objectives and market rates, but that's absolutely not what the precedent shows.

On the contrary, every single policy factor rate-setting bodies find is supported by marketplace rates. So I think the way to interpret fair return is fair market return, and trying to get into an ethical or a religious or some other sense of fair outside of that is really not a reasonable reading of the statute.

JUDGE STRICKLER: I am just going to ask

you if you are going to address this. I don't want you to get into this, because this would be even more tangential than anything else we have discussed this afternoon, but in the ordinary conception of fair market value that comes up most often in not necessarily in litigation or in these hearings, you have private goods with positive marginal costs.

And here by agreement, I believe it is unanimous, that the marginal cost of an additional stream is zero, assuming no cannibalization or substitution.

MR. SEMEL: The marginal production cost, right.

JUDGE STRICKLER: Fair enough, better way to say it.

Does -- are you going to be addressing in your arguments -- and you certainly don't have to do it now -- how if at all zero marginal production cost impacts how you determine fair market value?

MR. SEMEL: I do have some notes on it, and I can talk about it.

JUDGE STRICKLER: I don't want to mess up your presentation.

MR. SEMEL: No, no, this is much more appropriate for this than a slide show.

I think that, you know, the marginal production cost issue, I think it is a bit 20th Century. You know, this whole, this whole world is marginal. But this -- you know, marginal opportunity costs are marginal costs.

So the idea of just sort of leaving them out but they are the more important cost here.

JUDGE STRICKLER: Well, you leave them out and then for purposes of analysis, and then by all means you have got to put them back in. But you start off with that.

MR. SEMEL: Yeah, I guess. And I am not aware of why the fact that marginal production costs are zero should -- certainly not why it should weigh towards changing rates for market rates.

I will say, right, and I am not telling you anything you don't know, marginal costs for the licensor never exist, right? The licensor is just licensing the product. They have never had marginal costs.

It is the supply, the downstream entity where the marginal cost difference works, right? If I am a songwriter, it has never cost me money to license my song. I have fixed costs upfront. If I am a publisher, I have fixed costs, but the

licensing itself, it is the production. It is the downstream costs that are sometimes positive and sometimes not positive.

So what we're really talking about here is this is a situation that is great for the downstream entities. They have zero production costs. When they scale up, you heard them talk earlier about, even Dr. Gans and Dr. Watt talked about non-content costs under the Shapley and why they are going down. Why are they going down? They have zero production costs.

As they scale up, their costs don't go up because they have zero marginal cost. So the zero marginal cost, it comes in, but I don't see how it comes into vary things down from market rates. It is just a fantastic situation for them.

It is not different for the Copyright Owners. The Copyright Owners never have marginal costs. They are not the producers. They have fixed costs upfront. They are then licensing to the downstream market.

If you are doing CDs or vinyl, you have to go out and press them and you have to do all of this. That is Subpart A, another reason why Subpart A is not a great analogy, again, you have these

physical costs.

But in this market, they have got zero costs. They just -- all they do is set up a web site, throw the things on, and they are streaming. And the bigger they get, their costs stay the same. I mean, their advertising costs go up, things like that, they buy bigger offices and whatnot, but that's nothing compared to people who have to pay for every single unit.

JUDGE BARNETT: Well, bandwidth, let's be fair, bandwidth is not free.

MR. SEMEL: It is not, but Dr. Marx testified that it is virtually free. I mean, bandwidth cost is not much, but as she testified the marginal -- and I think you had gotten this -- the marginal production cost, which includes bandwidth, you are correct, it is not free, but it is effectively zero in everybody's understanding here.

And my point is just that I don't see how that works to bring rates down. That's just a great situation for them.

It is a reason why they can pay more. But I don't see how it is a reason why -- how they can use that to somehow pay less.

JUDGE STRICKLER: Well, my point was

actually about the marginal production cost of an additional stream being permitted by the licensors, licensed by a licensor to a licensee. There is no, leaving outside opportunity cost for the moment and cannibalization, there is no extra cost of doing it, to allow Spotify to stream a song to someone who listens on an ad-supported service, it doesn't cost a copyright owner or a publisher anything on the margin?

MR. SEMEL: Right. Well, absolutely correct, but I guess my point earlier, is it never costs. The licensor never has marginal cost. Like it doesn't cost you more to license more CDs. It doesn't cost more to license anything. Like you are just a licensor. Your costs are fixed upfront to create the music.

JUDGE STRICKLER: Unless you have to manufacture something.

MR. SEMEL: Right, but that wouldn't be a license. That would be, uquay, a manufacturer. But, uquay, the licensor, you never have a marginal cost. Your fixed costs are to create the good.

And, I mean, this is, I feel like, this is like information rules, right? This is like Hal Varian. And this is -- we don't live in that world

any more. Marginal production costs are zero. We move to a different model, but I don't see how the --

JUDGE STRICKLER: Excuse me. That's where I am going with it. And that's what the economists seem to talk about, which is that if you accept the fact, as you say, that it is ubiquitous that marginal cost, production cost is zero, you are not in the traditional fair market value, if I am selling a house to you and I'm trying to figure out the value of the house, positive cost to build or replacement cost type of situation, so we can sum up cost and there is marginal cost to building a physical product, where there is scarcity involved and rivalry of resources, but here it doesn't cost anything, so we're in what economists call and the economists here acknowledge was a second best world.

And in a second best world, you are trying to figure out the right way to price. And it is not at marginal cost because that would be destructive to the Copyright Owners because a price of zero destroys the industry.

So we have got to build up a price but some other way. So the fair market value phraseology, which is great as far as it goes, if

you apply what a fair market value is to a private good with positive production costs, to a market where you have zero marginal costs, talk about your apples and oranges, that is why there is the whole theory of the second best in intellectual property and economics.

MR. SEMEL: Right. Again, it is obviously absolutely correct. I guess the way I look at it in the context of this proceeding is when you are looking at it from the economic approach, and you will correct me if I get this wrong because you are the economist, you know, this issue of the second best and the issue of pricing with your demand curves and marginal cost is sort of how you are determining value or how you are determining pricing.

But in this proceeding you are not, even if you were in an old model with fixed costs, you are in a Subpart A model or whatever, you are probably not getting the underlying economic data of cross elasticities of demand and things like that that you would need to determine that under the old school model or in this model.

So I think for your purposes, the analysis has never changed. Marketplace

benchmarking is how you do it because you are never, whether you are under the neoclassical or the old model or new model, you are never getting that level of economic information to determine a demand curve.

JUDGE STRICKLER: It seems to me, though, and that's something the Services would probably, I think, agree with. They can't engage in, you know, get elasticities on a sufficient level to engage in anything approximating perfect price discrimination, so they have discount plans, they have ad-supported plans, they are trying to tease out different ones.

It seems to me, maybe you want to address this now to the extent you haven't, that the position of the Copyright Owners in that regard is, well, that's fine, but what does that have to do with us?

We have a product, and we're providing it to you. If you need to tease out willingness to pay in this good, go ahead and do it, but consistent with what Professor Watt said, there is a lot of different ways you can do that with a different upstream price that you pay. And it can be a positive price not tied to percentage-of-revenue, so why are you insisting that we adopt your business model?

Isn't that really the gravamen of the response to the fact that it may be marginal cost of zero but why -- why do we have to play your downstream game? We're selling you an upstream product.

MR. SEMEL: I think that's certainly a legitimate -- I think it is certainly a component of the copyrights argument. I think there is other things, though, that go into -- there is other reasons why it is objectionable. And that gets to the measurement issues and all of that.

But I think as Dr. Ghose testified as well, similar to that, is, yeah, you guys have a lot of ways to go out and figure out price discrimination if you want to do it like the rest of the world does with per-unit pricing for inputs.

The idea that there has been -- we have had music priced at per-unit charges since 1909, right? That is Subpart A. There have been record clubs and there have been discounts. Like we have never had a problem reaching the market and price discriminating.

All of a sudden these entities come up, and they are like: Oh, we can't do this, unless you give us a fluctuating, flexible royalty charge. And

it is just not -- and we have a section in our papers that gets at this, which is that the hypothetical disincentivization arguments, there is nothing -- they were questioned about that. We kept asking: What are you talking about? Where does this show up? No evidence for that.

And I will note also, remember, we're only one component of content cost, right? These things that they are worried about already exist and in much larger amounts than we're talking about currently in the market. And it is not causing any of these problems that they are talking about, right?

There is the per-user prong, these things exist already. They are already paying them. So I don't understand how the structure of this model is changed. If they are disincentivized, they are already disincentivized because they are paying those fixed unit fees to someone else.

JUDGE STRICKLER: Per-user fees?

MR. SEMEL: Per-user fee and per-playing fees.

JUDGE STRICKLER: Sometimes per-playing. Per user usually used as a floor on a percentage-of-revenue?

MR. SEMEL: Yes, the binding floor, but yes, that's right. But per users as well. And there is no indication that if the sky fell down when either of those is used.

So I just feel like these efficiency and disincentivization arguments, and I think Dr. Watt summarized it very well, they are just low rate arguments. And they hop from one to the other, whatever they can get them the lowest effective rate they can get.

JUDGE STRICKLER: And I know I said that is Dr. Watt's argument and I think it was, but it is really a two-pronged argument. I think Dr. Watt says they want lower rates and they want -- and they would like the ability to price discriminate as well as as much as they can. But that you don't need percentage-of-revenue rates to accomplish that.

MR. SEMEL: Right. Right. I think in general, I guess. I am not going to speculate would they like to price discriminate. I guess they would in the sense that you can capture more of your demand curve.

JUDGE STRICKLER: I don't think there is a dispute. They do. That is the point you made when you say look at the per unit rates. They are

all over the chart. They are all over the place on these per unit rates.

MR. SEMEL: Right.

JUDGE STRICKLER: I mean, on a per unit. If you are not charging the same per unit price, by definition you are price discriminating.

MR. SEMEL: Right, that's fair, yes. Absolutely, yeah.

JUDGE STRICKLER: So I'm sorry. Go ahead.

MR. SEMEL: No, no.

So, anyway, this is really getting at a point and Your Honors can look at this and maybe you already familiar with it, it is amazing how much precedent there is that every single factor works with marketplace rates.

So when you hear the Services say you don't have to use marketplace rates, yeah, but why wouldn't you use marketplace rates?

I mean, that's where you are getting all of your good information. That's what's helping Your Honors get to your decision. So the first factor, the second factor, the third factor -- and I am quoting again Your Honors to yourself and the fourth factor -- they talk so much about disruption

but as Your Honors note, benchmarks based on marketplace agreements by their nature enable them to implement their business model. You can talk whatever you want about what disruption means, but if you can implement your business model, I don't see how that can be called disruption.

And there was a note in, going back to the second factor under this SDARS quote, so apt to this case, by the way, you know, they note that, you know these are enterprises that are in highly leveraged structures. This idea that they should get profits in the current license term, that's just not what these rates are about. And they say affording Copyright Owners a fair income is not the same thing as guaranteeing them a profit in excess of the fair expectations of a highly leveraged enterprise.

So I can see I am going on. So I am going the try and get through very quickly.

Dr. Eisenach sound recording benchmark analysis. And we have talked a lot about this, but, again, the heart of this is the marketplace rates.

And he is the person who does an empirical analysis of actual negotiated marketplace rates. The Services all rely on phonorecords

proceedings' outcomes, which don't get you all of the value. All of these things that were talked about under the first, second, third factor, those don't come from shadow settlements.

And the TCC prong supports this. I just love this bit, because as I talked earlier, the Services are so busy talking out of both sides that they don't realize when they are contradicting themselves.

So these are two examples. The top one is from the joint where they are attacking Dr. Eisenach for his valuation ratio, and they quote, he boldly asserts that for my purposes, it is sufficient simply to assume that the relative value of the two rights should be stable. And then in the next one, they cite to him for that exact same sentence in approval, saying there is no reason to believe that the relative contributions would vary.

So, I mean, this is, when they are attacking him for doing the exact same thing that they are supporting under the TCC prong. The difference is he is doing it correctly. He is doing an economic benchmarking analysis with marketplace rates.

They are claiming you can get relative

values and then using this Subpart A regulated situation.

JUDGE STRICKLER: Are these really inconsistent? Because it looks like in paragraph 260, they are saying that, you know, he is pointing out, he assumes -- and Dr. Eisenach was quite clear about that, that he was eschewing theory to get to that point, but in paragraph 32, they are saying there is no reason to believe that the relative contributions would vary. And they are saying that's right, there is no reason. He has no theory. And they are saying there is no reason. Theory and reason --

MR. SEMEL: Sorry, I took it out of context. When they say no reason, I think it means there is no reason to believe. If I gave it to you in the bigger context, I guess you can look at it. You will see this is where they are trying to support their Subpart A analysis and they are looking at Subpart A and B and trying to say these would be the same.

And then they cite to him for the same thing that they attack him, the same sentence they attack him for above. So this is just in the bottom one they are trying to support Subpart A and in the

top one they are trying to knock down his analysis.

They are both based on the same relative value assessment, but again the difference is he does it in an economic way. They look at a regulated industry, you know, like the other example of benchmarking that I am aware of at least is when you benchmark your computer for speed, and they always say you don't use your own computer to benchmark your computer for speed, right?

It doesn't work that way. You have to use something else to benchmark the thing you are trying to measure. And that's the whole reason benchmarking works. And they are just trying to use the thing, they are using the regulated rate to benchmark the regulated rate. It doesn't work.

So, anyway, now I am in restricted from here on out, but hopefully it will move quickly.

JUDGE BARNETT: Okay. This will conclude the open portion of our closing arguments. And if you are not permitted to hear restricted material, you may be excused and thank you for coming.

(Whereupon, the trial proceeded in confidential session.)

O P E N S E S S I O N

JUDGE BARNETT: I want to let your clients know that they have been exceptionally well represented. This has been a true pleasure for all of us. Now the fun begins.

It is not going to be easy because of the quality and content of the evidence and presentation of evidence and the complexity of the issues, as my colleague reminds me.

We had an initial meeting yesterday which issues just kept tumbling out and tumbling out and tumbling out. So we will -- we are tackling it. We appreciate your professionalism, all of you. You have worked very well together. And I would expect no less of the caliber of firms and attorneys of this caliber, but nonetheless, it is always pleasant to have actually happen. And thank you very much.

I will say at this point the record is now closed. And if you need anything further or anything comes up, you will hear from us. So thank you all very much.

(Whereupon, at 5:51 p.m., the hearing concluded.)

C O N T E N T S

CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

6/13/17 Karen Brynteson

Date Signature of the Court Reporter